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CHARLES C. WHITTELSEY, Esq., a prominent member of the Saint Louis bar, died at his residence in this city last week, after a brief illness, at the age of fifty-six. Mr. Whittelsey was a native of Connecticut, but came to this city in 1841, where he soon established himself in a successful practice. He was for several years reporter of the decisions of the Supreme Court of this state, and discharged the duties of that office with skill and fidelity. He also wrote a treatise on the practice of the courts of record of Missouri, and compiled a book of forms applicable to this state, which, we believe, has gone through several editions. He was also one of the editors of the Western Jurist, though we believe he wrote little for that publication. Mr. Whittelsey was not merely a lawyer, but was a gentlemen of extensive literary and scientific culture. *De mortuis nil nisi bonum* is a charitable máxim, in pursuance of which the faults of many lawyers are made to perish with them; but the professional brethren of Mr. Whittelsey can testify without mental reservations, but with mingled satisfaction and regret, that, in all his professional and private conduct he never put aside the character of a gentleman.

English Opinions of American Law Books.

We have noticed with much interest, in one or two recent instances, the manner in which English law journals speak of the works of American legal authors. A recent number of the Law Times (48 L. T. 301), in noticing Mr. Hilliard's work on Injunctions, tells us that Joyce, the English author, in his treatise on the same subject, has "swept together English as well as American cases;" and the reviewer further informs us that Mr. Joyce "swept" the American cases out of Mr. Hilliard's book, and into his own, instead of resorting for them to the original reports. This practice, the reviewer thinks (and we think so too), "is calculated to have a very mischevious tendency, and to produce a repetition of blunders which every text-writer is liable to make in interpreting case law. The ordinary class of text-books should not be written unless the author is prepared to go to the source of the law for himself—those portions which an author proposes to take second-hand he had far better leave alone." "Moreover," he adds, "it is doubtful whether the proceeding is altogether fair; for had not Mr. Joyce borrowed from Mr. Hilliard, English lawyers might have thought it expedient to buy Mr. Hilliard's book."

The reviewer thinks Mr. Hilliard's book "worth purchasing, his arrangement being clear, and, as far as possible, scientific." He pronounces the chapters on Easements, Contracts and Negotiable Instruments "excellent specimens of text-book writing," and says that they "deal ably with the English cases."

The same journal (48 L. T. 302), in reviewing Dr. Wharton's work on Negligence, uses the following language:

> The reason why American legal literature has attained to such excellence, is that so many American lawyers write from sheer love of study, publication being a secondary consideration. English lawyers too often, we fear, write to make themselves known, and in pursuit of this one object, they miss, perhaps, a reputation which they might have acquired had they been less hasty in writing, or not written at all. It is frequently deplorable to contemplate the trumpery *brochures* which are issued from the press with the author's name conspicuously gilt-lettered upon every available part of the cover, and it is scarcely comprehensible how educated men can put to sea in such ridiculous cockleshells.

This reviewer quotes with approbation the views of Dr. Wharton with reference to the difference between the doctrines of the classical and scholastic jurists as to the degrees of negligence, and declares that "in Mr. Wharton we have a text-writer of no ordinary character." He adds that "the whole of what Mr. Wharton writes is governed by his allegiance to the principles of the classical jurists, and it is of the utmost interest to follow the arguments which pervade his book." "His notes," he says, "are full of the fruits of a diligent and intelligent research, and the work must take its place in the front rank of legal literature."

Sale of Public Cemeteries.

The case of Louisville v. Nevin (*ante*, p. 108), where it was held that a court of equity will not decree the sale of a graveyard to enforce a lien for grading and paving an adjacent street, calls to mind three cases which are set out at some length in Hilliard on Injunctions, 3d ed., pp. 409-12. The first is that of Beatty v. Kurts, 2 Pet. 566. In this case the ancestor of one of the defendants had, by parol, dedicated a parcel of ground to an unincorporated religious society, and they had built a church and laid out a burying-ground upon it. The church had fallen down and gone to decay, but more than half the lot was covered with graves, and it had been thus occupied for more than fifty years. The court sustained the award of an injunction to prevent the disturbance of the cemetery by the heir of the original donor and another pretended owner. Mr. Justice Story, in delivering the opinion of the court, said: "No action at law would afford an adequate and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown Congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry, to those who may visit the spot in future generations. It can not be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living."

The second case is that of The Commonwealth v. Viall, 8 Allen, 515, where it was held that cutting trees upon a public burial ground, for purposes of private profit, without consent of the public authorities having charge of it, was a violation of a statute which gave a penalty for destroying trees within the limits of a place of burial, although the person who cut the trees was the owner in fee of the land, and honestly be-

lieved that his acts were lawful. No cases were cited; but Mr. Justice Hoar, in delivering the opinion of the court, uses the following language: "Although it has been said that the Puritan founders of our commonwealth, in opposition to what they regarded as superstitious observances, conducted funeral services with an austere simplicity, and often chose the most bleak and barren spots as their place of sepulture; yet the whole sentiment of the community has long since changed in this respect, and the refinements introduced by modern taste have commended themselves to the general approbation. * * * The growth of these trees may have been watched with affectionate interest by the friends and relatives of the departed, whose last resting-place has been made more pleasant to the imagination of the survivors, by the thought that it might become a resort of birds, and a place for wild flowers to grow; that waving boughs would protect it from summer heat and from the bleak winds of the ocean. The fallen leaf and withered branch are emblems of mortality; and in the opinion of many, a tree is a more natural and fitting decoration of a cemetery than a private monument. The dedication of the land for a permanent grave-yard was in its nature a dedication to a permanent use, varying in its details according to the customs of successive generations, but not to be defeated or impaired by the dictates of private caprice."

The third case is cited by Mr. Hilliard (Hilliard on Injunctions, 3d ed., p. 411), from the Legal Intelligencer, volume and page not given. A Jewish benevolent society had in its *amended* charter a provision that in case of the dissolution of the society, the assets should be equally divided among the members. Among these assets was a burying ground in which the society had been accustomed to bury its dead. It was held that the society could not, on dissolution, sell the burying-ground and divide the assets among the members, and an injunction was awarded by Judge Sharswood, at *nisi prius*, to restrain them from so doing. The *original* charter of the society, however, under the provisions of which the assets seem to have been contributed to the society, contained a provision that the society should never be dissolved, but that after the death of all its members, its assets were to be transferred to the oldest Jewish society in the city and county of Philadelphia, "for the relief of the Jewish poor." These provisions were held to raise a trust for a charity, and it was held that the proposed division of the assets of the society would be a clear invasion of the trust on which these assets had been received from the donors.

Remedies for Crude Legislation.

It would be well if some of the able lawyers elected to the Missouri constitutional convention would direct their attention to the question whether some remedy might not be devised to prevent the passage of acts crude, ungrammatical and doubtful or equivocal in their meaning, which often appear in our statute books. It has been frequently suggested that such bills as seek to change the penal statutes, or the rules of property, of evidence or procedure, should be officially published and lie over from one session to another, in the hands of a permanent committee, before being finally voted upon: such committee being charged with the duty of correcting faults of grammar or phraseology and otherwise putting the bill in shape, so that the courts can understand what it means, and so that it will "work."

Whether this suggestion be a judicious one or not, it seems at least necessary and just that before bills are passed by the legislature, they should be gazetted in certain official journals published in different portions of the state, and thereby *made public;* and it would seem wise to place a restriction upon the legislature that no bill shall be finally voted upon until it has been thus gazetted for a certain number of days in the official journals. To this restriction certain exceptions might be made, as in case of revenue laws, or in other cases where a vote of *urgency* is passed by a prescribed majority. The reasons which urge the wisdom and necessity of this restriction are that the voluntary exertions of the press, great as they are, are utterly inadequate to inform the people of the nature of the various measures which are pending before their legislatures. As a matter of fact, very few of the laws passed at any one session are ever published in full, even in the leading newspapers, before their passage. It not unfrequently results that, after the adjournment of a legislative session, the people wake up to a realization of the fact that their rights have been sold out or their interests prejudiced in some important particular. We could not illustrate what we say more appositely than by the case of an act which recently passed the Missouri legislature, changing the law with regard to taking depositions *in Saint Louis county*. Why the law needed changing in Saint Louis county and not elsewhere, is certainly calculated to arrest the attention and excite the curiosity of the practical lawyer. It did not, however, arrest the attention of the bar of Saint Louis until it had become a law; and now that it is too late to petition or protest, we hear nothing but unfavorable comments upon it. Rumor even charges that it was lobbied through by a prominent life insurance company of Saint Louis to prevent the bringing of prying suits against it, designed to probe its internal affairs and ascertain the mode in which its business is conducted.

We urge then that, subject to certain necessary exceptions, it ought to be placed beyond the competency of the legislature to pass laws, until—by an authorized publication in certain prescribed journals, where the public may know where to look for them, and for a sufficient period of time—the people may be made acquainted with their contents.

Another suggestion which would seem to commend itself for its justice and wisdom, is that before important laws are passed, the people should not only have *notice*, but that they should, so far as is consistent with the speedy despatch of the legislative business, have *the opportunity of being heard*. In courts of justice, where private rights are to be concluded, these two conditions are the universal requisites of jurisdiction. Why should it be the less so, where the agents of the people are assembled in a *general court* to pass upon *public rights* of the most momentous character? In respect of the matter embodied in this suggestion, legislative science has advanced little beyond the state in which it existed during the period of the Wittena-Gemote of the Saxons. Legislative assemblies still consist of agents or deputies of the people who meet in general counsel, and, with more or less tumult, and with infinite intrigue and chicane, proceed to the transaction of the public business; every member, except the pre-

siding officer, occupying the dual position of advocate and judge. If a private suitor, in a court of justice, desires to incline the ear of the court or of the jury favorably to his cause, he can approach neither the one nor the other *in private*, nor is it tolerated that he should argue his case through the public press, or by oral declamations to the people; but he must, either by himself or his counsel, in open court, make solemn argument to the court or jury, giving the opposite party an opportunity to hear and to reply. But when an individual from the body of the people desires to support or oppose a particular measure before the legislature, he prints articles in the newspapers, which may or may not be read by those whom it is designed to influence; he makes speeches (not before the legislature), but before public meetings hundreds of miles away; he writes private letters to particular members, in which he may offer arguments honorable or dishonorable to secure their votes; he visits in person particular members; he button-holes them in private; he "treats" them, he dines them, he sups them, and thus brings to bear upon them influences which the public can never understand; he does everything except what he ought to do—make public argument before the legislative body itself. To make the contrast appear more striking between legislative and judicial procedure, it is thus seen that whatever it is prohibited to a suitor in a court of justice to do, he does before the legislature; and the very thing which is expected or required of a suitor in a court of justice, before his cause will be determined, he is here prohibited from doing. If argument is ever heard, it is heard by a committee composed of a few members, and is generally *ex parte*. No notice is given to opposing parties, and there is nothing which exhibits the orderly characteristics of a proceeding in a court of justice.

The points which we urge, then, are that parliamentary procedure should be changed (1), so that when a bill has been read, reported favorably from committee, and amended so far as the house in which it originated deems expedient, it should be transmitted to the other house, and when it has there gone through a like process, and when it has gone through the necessary steps to make it ready for its final passage in both houses, it should be published for a certain length of time in the official gazettes; and, when this has been done, those favoring or opposing the bill, should be permitted to appear by counsel, and, subject to such restrictions as may be necessary for the convenient dispatch of business, argue it before each house. We will cite a single case in illustration of this suggestion. There is a bill before the legislature of Missouri, "to quiet titles to land," etc., which we have twice discussed in these columns (*ante*, pp. 134, 166). It is safe to say, that there are not a dozen members in both houses who understand what effect this bill will have, if passed, or who are sufficiently advised as to the policy and expediency of passing it, to vote intelligently upon the question. There are two lawyers in St. Louis, Mr. Hill, who is understood to have drawn the bill, and Mr. Morrison, who strenuously opposes its passage, who, in two hours, if permitted to address each house upon the subject, could throw more light upon it, than could be derived from a whole week of legislative wrangling.

Another suggestion which we have frequently seen, looks to the adoption by each house of some practical measure with the view of reducing bills to proper and grammatical language, before they are put upon their final passage. Our statute books are full of instances of laws, whose bad English and ill-devised phraseology afford a constant puzzle to the courts, and constantly bring our legislative bodies into contempt. We could cite many instances, from the statute books of different states, but the following literal transcript of a bill, recently introduced into the Alabama legislature by a colored member, named Wynne, will afford a striking illustration of the evil complained of:

SECTION 1. Be it enacted by the general assembly of Alabama, That any person having a case pending before the jurisdiction of any court, accept under the criminal or circuit court, and such persons making compromise of such cases as the aforesaid, the provisions of this act is also authorized by law to regulate such casses.

SEC. 2. Be it further enacted, That any person from and after the passage of this act, who wilfully refuses to refund such casses are guilty of the violation of this act, and uppond conviction may be sentenced to jail for not more than *three* months, nor less than one month, and be amended so as to read as follows: That all casses, such as assault and battery are also indicated in the first section of this act of casses of compromizes may be rendered.

SEC. 3. All laws or parts of laws in conflict with the provisson of this, the same be and are hereby repeiled.

Now, the most feasible remedy which we have seen suggested for this evil, is a committee in each house, composed of scholars and lawyers, whose duty it should be to supervise the technical wording of bills, to eliminate grammatical blunders, to make plain the obscurities, to simplify complexities, and to harmonize repugnancies. Whether the establishment of such committees would be practicable; whether their labors would go far toward remedying the evil complained of; and whether their establishment would not open new doors for frauds upon legislation, are questions which could only be decided by practical experience. At all events, it would seem, the experiment is worth the trial.

This precise subject was recently broached in the British House of Commons, by Mr. Forsyth, who directed attention to the manner of drawing modern statutes, and more particularly to the practice of legislating by incorporating with, and referring to, portions of other statutes. A bill, as Mr. Forsyth stated, might be admirably drawn, yet after the second reading, when it was considered in committee, amendments were introduced which conflicted with other parts of the bill, and which caused the greatest difficulty when the measure came to be administered as law, and construed by the judges. These amendments or alterations, it was suggested, should be finally considered and revised by a committee of the house, assisted by a legal officer, who should afterwards report to a committee of the whole house as to the accuracy of language, consistency of provisions, and harmony with existing legislation. The attorney-general admitted the necessity for some amendment of the present system, and undertook, on the part of the government, that it should receive early consideration. He was, however, of opinion that the plan proposed by Mr. Forsyth was not practicable.

The foregoing suggestions would seem worthy of consideration; and if carried out in whole or in part, might result in the achievement of two objects, either of which is devoutly to be wished: 1, better legislation; 2, less of it.

—A MEMBER of the legislature of Idaho, overwhelmed by the numerous and pressing applications for the legal separation of married couples, has introduced a bill divorcing all the married people in the territory. This modern Solon gives as his reason for this singular proposition that it will save time, and time is money. He sagaciously remarks that all who wish to do so can get remarried.

Jurisdiction of Courts of Equity to Grant Relief in Case of Forged and Fraudulent Wills.

JOHN KIELY AND MARY, HIS WIFE, *ET AL.* v. JOHN A. GLYNN *ET AL.*

Supreme Court of the United States, No. 141,—October Term, 1874.

1. **Equity no Jurisdiction to Avoid Will for Fraud, Mistake or Forgery.**—A court of equity has not jurisdiction to avoid a will or to set aside the probate thereof on the ground of fraud, mistake, or forgery; this being within the exclusive jurisdiction of the courts of probate.

2. ——. Nor will a court of equity give relief by charging the executor of a will or a legatee with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief by refusing probate of the will in whole or in part.

3. ——. **In Case where Courts of Law have Jurisdiction.**—The same rule applies to devises of real estate of which the courts of law have exclusive jurisdiction, except in those states in which they are subjected to probate jurisdiction.

4. ——. **When Equity will Interpose.**—*It seems* that where the courts of probate have not jurisdiction, or where the period for its further exercise has expired and no laches are attributable to the injured party, courts of equity will, without disturbing the operation of the will, interpose to give relief to parties injured by a fraudulent or forged will against those who are in possession of the decedent's estate or its proceeds, *mala fide*, or without consideration.

5. ——. **Laches.**—But such relief will not be granted to parties who are in laches, as where from ignorance of the testator's death they made no effort to obtain relief until eight or nine years after the probate of his will.

6. ——. ——. **When Ignorance will not Excuse Delay.**—Ignorance of a fraud committed, which is the ordinary excuse for delay, does not apply in such a case, especially when it is alleged that the circumstances of the fraud were publicly and generally known at the domicil of the testator shortly after his death.

7. **Equitable Jurisdiction of U. S. Circuit Courts.**—Whilst alterations in the jurisdiction of the state courts can not affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit court as well as by the courts of the state.

Appeal from the Circuit Court of the United States for the District of California.

This is a suit in equity brought by the alleged heirs-at-law of David C. Broderick, late United States Senator from California, to set aside the probate of his will, and have the same declared a forgery, and to recover the said Broderick's estate, much of which consisted of lands now comprised in the thickly settled portions of the city of San Francisco.

The complainants are John Kieley and Mary, his wife, George Wilson and Ann, his wife, and Ellen Lynch, all residents of Sidney, in New South Wales, and subjects of Great Britain and Ireland. They allege that Mary Kieley, Ann Wilson, and Ellen Lynch were, at the death of Broderick, his next of kin and only heirs-at-law, being daughters of Catherine Broderick, sister of Thomas Broderick, the father of the said David.

There are several hundred defendants, who are in possession and claim to be owners of the property in question. John A. McGlynn, one of the executors who propounded the will and procured its probate, is also one of the defendants.

The bill was filed on the 16th of December, 1869, and states that David C. Broderick died on the 16th of September 1859, intestate, being at the time a citizen of the United States and a resident of San Francisco, in California, seized and possessed of real and personal property in said state. Then after stating the relationship and status of the complainants, the bill proceeds to allege that at the time of his death, Broderick was seized of the real estate set out in the schedule annexed to the bill, and was possessed of personal property to the amount of $20,500, also set forth in a schedule.

It then alleges that on the 20th day of February, 1860, the defendant John A. McGlynn, on behalf of himself and one Andrew J. Butler, presented to the probate court of San Francisco, a certain paper writing (a copy of which is annexed) which they falsely pretended was the last will and testament of said David C. Broderick, in which said McGlynn, Butler, and one George Wilkes were named as executors, and, at the same time, presented their petition in writing, whereby they prayed the court to admit the said will to probate, and issue to them letters testamentary, knowing, at the time, that the said paper was a forgery. And the bill charges the fact to be that it was a forgery, and not Broderick's will; that it was forged about the 1st of January, 1860, after his death, for the purpose of defrauding his legal heirs, and that it was written by one Alfred A. Phillips, and that the name of David C. Broderick was signed thereto by one Moses E. Flanagan. The bill then proceeds to state as follows:

"That the said Butler, well knowing that the said paper was a forgery, caused it to be presented, as aforesaid, as the genuine, true and valid will of the said David C. Broderick, and caused a commission to issue under the seal of the said probate court, to a commissioner of the state of California residing in New York city, to take the testimony, reduce to writing, and return it to the said probate court, of John J. Hoff and Alfred A. Phillips, whose names appear as subscribing witnesses to said paper; and their testimony was so taken and returned, to the effect and purport that the name of the said David C. Broderick, signed to said instrument was the genuine signature of the said David C. Broderick, and that he did sign, seal, publish, and declare the said instrument to be his last will and testament, in the presence of the said witnesses; and that they did sign the same, as witnesses, at his request, in his presence, and in the presence of each other; and the said Butler did, also, procure and present to said court the testimony of certain experts in handwriting, who testified to said court that, in their opinion, the name of David C. Broderick, subscribed to the said paper, was in the genuine handwriting of the said David C. Broderick; he, the said Butler, well knowing that the same was not the genuine handwriting of said David C. Broderick, and the same was not in truth and fact the genuine handwriting of said Broderick; and by means of such false testimony (your orators not having any notice in fact of said proceedings, and no one appearing in their behalf), they did obtain the order and judgment of the said court, admitting the said will to probate as the genuine last will and testament of the said David C. Broderick, and granting letters testamentary to Andrew J. Butler (now deceased), and John A. McGlynn, as executors of said last will and testament, and they proceeded to act as such executors, allowed and procured to be approved by the probate judge, claims against the said estate to the amount of $80,000.

"And afterward the said Butler and McGlynn caused application to be made to said probate court for, and obtained, an order of sale of the estate of the said Broderick, deceased, under which they sold the whole of the said estate. That at the time of said sale, which took place in the city and county of San Francisco, it was a matter of public and general notoriety that the said pretended last will and testament of said David C. Broderick, under and by virtue whereof all said probate proceedings were taken and said property sold, was not the will of said Broderick, but was a forged and simulated paper, and all of those who purchased at said sale, and the defendants and those through whom they deraign title subsequent to the said sale, purchased and acquired whatever interest they have or had with full notice of the frauds hereinbefore alleged."

It appears by a subsequent statement that the will was admitted to probate on the 8th of October, 1860, and that the sale referred to took place November 7th, 1861.

The bill then alleges that the complainants had no knowledge or information of Broderick's death, nor of the forgery of the will, nor of its presentation for probate, nor of the probate or order of sale, nor of any of the proceedings, until the last day of December, 1866, within three years of filing the bill; and that since that time they have been diligently endeavoring to discover the facts and the evidence relating thereto.

The bill charges that the defendants claim to own or are in possession of some portion of Broderick's estate, deriving their only title or claim thereto by or under the probate sales and conveyances

as made by said pretended executors by virtue thereof; that Butler is dead, and that Wilkes no longer has any interest.

The bill then prays an answer to several specific interrogatories, as, namely, whether the several defendants do not know, or have not been informed, that the probated paper was a forged instrument? Whether it was not, in fact, forged, and not the will of Broderick? Whether it was not fabricated after his death, as stated in the bill? Whether Butler did not cause it to be propounded for probate, knowing it to be a forgery? Whether he did not procure the testimony and probate, and sell the property by virtue of orders of said probate court, as stated? And that McGlynn and others, who took part in the probate sale of the property, may set forth the details thereof, the time when sold, the amounts received, and the dispositions of the proceeds?

The bill prays that the will may be declared a forgery; that the probate and all subsequent proceedings may be set aside and annulled, including the decrees of probate, sale, etc., or that the defendants, purchasers of lands and lots under the said orders of sale, or deraigning title therefrom, may be charged as trustees for the complainants, and may be compelled to convey to them, or that a commissioner be appointed to make such conveyance, and for general relief.

By the will in question, a copy of which is annexed to the bill, the testator, after payment of his debts, gives to his friend, John A. McGlynn, ten thousand dollars, and all the residue of his estate to George Wilkes, of New York, and makes Wilkes, McGlynn and Butler executors. It purports to be dated at New York, January 2, 1859.

Many of the defendants answered the bill, denying all knowledge or belief of any fraud or forgery in the will, and claiming to be *bona fide* purchasers without any notice of any such fraud or forgery. Many other defendants demurred to the bill.

In August, 1871, an amended bill was filed, whereby the complainants reiterate with much particularity, the facts that they never resided in California or the United States, and never heard, or had any opportunity of hearing of Broderick's death, or the events connected with the probate of the will, until more than eight years after its being filed for probate, being illiterate, and living in a remote and secluded region in Australia, and stating other facts of the same general character to account for their not having sooner taken any proceedings to assert their rights.

Demurrers were also filed to the bill as amended, and upon the argument of these demurrers, the bill was dismissed by the circuit court. From that decree the present appeal was taken.

The grounds relied on by the defendants on the demurrer, and by the appellees here, are—

1. That a court of equity has no jurisdiction of the subject-matter of this suit, the same being vested exclusively in the probate court of the city and county of San Francisco.

2. That the action is barred by several statutes of limitation of the state of California.

3. That the defendants were purchasers at a judicial sale, made under the orders of a court of competent jurisdiction, never reversed or set aside, and not impeached by the bill.

4. That the complainants are non-resident foreigners, incapable of taking or holding property in California.

Mr. Justice BRADLEY, delivered the opinion of the court.

As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of Kerrick v. Bransby, 3 Bro. P. C. 358, decided by the House of Lords in 1727, is considered as having definitely settled the question. Whatever may have been the original ground of this rule (perhaps something in the particular constitution of the English courts), the most satifactory ground for its continued prevalence is, that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief.

In England after the acts of Parliament had authorized devises of real estate, the same position was assumed by courts of equity in regard to such devises; it being held that any fraud, illegality, or mistake affecting their validity, could be fully investigated and redressed in the courts of common law, where also devises were recognizable.

An occasional exception, or apparent exception, to this non-interference of courts of equity with wills and devises is found in the books; but these occasional departures from the rule are always carefully placed on such special grounds that they tend rather to establish than to weaken its force. One of the most prominent cases adverted to is Barnesley v. Powell, Vesey Sen. 284, in which an executor and residuary legatee had procured probate of a forged will by fraudulently inducing the testator's son, the person most directly interested, to execute a deed consenting to its probate, and Lord Hardwick declared the deed void, and compelled the executor to consent, in the ecclesiastical court, to a revocation of the probate. But in doing this his lordship made a labored argument to show that the ecclesiastical court had no power to annul that deed, and that had it attempted to do so the common law courts would have restrained it by prohibition.

It has also been held that where a person obtains a legacy by inserting his own name in the will, instead of that of the intended legatee, he may be declared a trustee for the latter. Marriott v. Marriott, 1 Strange, 666. In such a case the court of probate could not furnish a remedy, since to strike the bequest out of the will, or to refuse probate of it, would defeat the legacy altogether; and that court is incompetent to declare a trust.

The English authorities were fully discussed by Lord Lyndhurst in Allen v. McPherson, 1 Phillips' Ch. Ca. 133, and by him and Lords Cottenham, Brougham, Langdale, and Campbell, in the same case on appeal in the House of Lords. 1 H. of Lds. Ca. 191. In that case a codicil was revoked by a subsequent one, in consequence of false and fraudulent representations on the part of the person to be benefitted by the change, prejudicing the testator against the person injured thereby. A bill was filed praying that the executor might be declared trustee for the first legatee to the extent of the legacies revoked. This bill was demurred to and dismissed; and the whole discussion turned upon the question whether or not the ecclesiastical court had jurisdiction to enquire of the matters of fraud alleged; and the court being of opinion that it had jurisdiction, the decree was affirmed. The court came to the conclusion that the ecclesiastical court had power to refuse probate of the revoking codicil, and, indeed, had had the question before it; but after investigating the facts had granted the probate. "If," said Lord Lyndhurst, "an error has been committed in this or any other respect, which I am very far from supposing, that

would not be a ground for coming to a court of equity. The matter should have been set right upon appeal. But the present is an attempt to review the decision of the court of probate, not by the judicial committee of the privy council, the proper tribunal for that purpose, but by the court of chancery. I think this can not be done. It was formerly, indeed, considered that fraud in obtaining a will might be investigated and redressed in a court of equity; but that doctrine has long since been overruled." 1 Ho. Lds. Ca. 209. Lord Lyndhurst also reviewed the cases in which a legatee or executor had been declared trustee for other persons, and came to the conclusion that they had been either questions of construction, or cases in which the party had been named a trustee, or had engaged to take as such, or in which the court of probate could afford no adequate or proper remedy. The effect of his reasoning was, that where a remedy is within the power of the ecclesiastical court, either by granting or refusing probate of the whole will or codicil, or of any portion thereof, a court of equity will not interfere. And this was the view of a majority of the law lords on that occasion, Lords Brougham and Campbell agreeing with Lord Lyndhurst.

It seems, therefore, to be settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate. It will only act in cases where the latter courts can furnish no adequate remedy.

It is laid down in the Duchess of Kingston's case (20 Howell's St. Tri. 544), it is true, that fraud will vitiate the most solemn adjudication of all courts; and so it will, when set up in the proper manner, by the proper parties, and in the proper court. But a person who in contemplation of law has has a day in court, and an opportunity to set up the fraud, and had not done so, is forever concluded, unless he was ignorant of its perpetration, in which case he will be entitled to set it up whenever he discovers it, if not himself guilty of laches.

The same principles substantially have been adopted by most of the courts having equity jurisdiction in this country. The point was considerably discussed in the case of Gaines v. Chew and Relf. 2 Howard's R. 619. That was a bill filed by the heir-at-law of Daniel Clark, and charged that a certain will made by him in 1813 was fraudulently suppressed, that another will made in 1811 was fraudulently set up and admitted to probate, and that the defendants, some of whom were executors of the latter will, and others purchasers of the estate, knew the fraud and could furnish the facts to establish the same, and had received large rents and profits from the estate, of all which the bill sought a discovery, and an account of profits received. The bill was demurred to, and on a division of opinion between the judges of the circuit court, the case came to this court on several questions stated, one of which was, whether the circuit court as a court of equity could entertain jurisdiction without probate of the suppressed will. Justice McLean, delivering the opinion of the court, said: "Formerly it was a point on which doubts were entertained, whether courts of equity could not relieve against a will fraudulently obtained. And there are cases where the chancery has exercised such jurisdiction. * * * In other cases such a jurisdiction has been disclaimed, though the fraud was fully established. * * * In another class of cases the fraudulent actor has been held a trustee for the party injured. * * * These cases [referring to various cases cited in the opinion] present no very satisfactory result as to the question under consideration. But since the decision of Kenrick v. Bransby, 3 Brown's P. C. 385, and Webb v. Cleverden, 2 Atkyns, 424, it seems to be considered settled in England that equity will not set aside a will for fraud and imposition. The reason assigned is, where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court; and, at law, on a devise of real property. * * * In cases of fraud equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given." After referring to several cases, the judge proceeds: "The American decisions on this subject have followed the English authorities. And a deliberate consideration of the question leads us to say that both the general and local law [of Louisiana] require the will of 1813 to be proved before any title can be set up under it." The court, however, sustained the bill as a bill of discovery to assist the complainants in their proofs before the court of probate, and intimate, on the authority of Barnesley v. Powell, that if the probate court should refuse to take jurisdiction from a defect of power to bring the parties before it, lapse of time, or any other ground, and there should be no remedy in the higher courts of the state, it might become the duty of the circuit court, having the parties before it, to require them to go to the court of probate, and consent to the proof of the will of 1813 and the revocation of the will of 1811; and the judge also went so far as to intimate further that should this procedure fail it might be a matter of grave consideration whether the inherent powers of a court of chancery might not afford a remedy, where the right was clear, by establishing the will of 1813. Of course, the latter expressions were *obiter dicta*, and can hardly be said to have the support of any well-considered cases. But the matter decided by the court, and the burden of the opinion, is in strict accord with the settled conclusions of the English courts.

Without quoting from the decisions of the various state courts, it is sufficient to refer to the case of California v. McGlynn, 20 California R. 233, on the very will now in question. That case was founded on an information for an escheat of Broderick's estate and a bill in equity at the suit of the state against the executors of the will, praying for an injunction to restrain them from selling the property of Broderick, and from intermeddling therewith. The principal frauds set up in the present case were set up in that, and a preliminary injunction granted by the district court was dissolved by the supreme court on appeal, on the ground that the probate of the will belonged to the exclusive jurisdiction of the probate court, and having been decided by that court was *res judicata* and could not be reviewed by the court of chancery. The opinion of the court, delivered by Justice Norton, is quite elaborate and arrives at the following conclusion: "Upon examining the decisions of the Supreme Court of the United States, and of the courts of the several states, it will be found that they have uniformly held that the principles established in England apply and govern cases arising under the probate laws of this country; and that in the United States, wherever the power to probate a will is given to a probate or surrogate's court, the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court, or be set aside or vacated by the court of chancery on any ground." 20 Cal. 268.

The judge further stated what the statutes of California demonstrate, that in that state the jurisdiction of the probate court is the same in regard to wills of real estate as to the wills of personal estate, both classes requiring probate, and the probate of each having the same validity and effect. This is the case in several, perhaps the greater number, of the United States. In some of the older states, as in England, the probate of a will has no effect upon devises of real estate therein, except perhaps to stand as *prima facie* proof of its execution. But in many states wills of real and personal estate are placed upon the same footing in respect to probate and authentication. It is true the estate in lands devised goes to the devisee and not to the executor, but that is the only difference in the effect of the will or probate as respects the two classes of property.

There is nothing in the jurisdiction of the probate courts of California which distinguishes them, in respect of the questions under consideration, from other probate courts. They are invested with the jurisdiction of probate of wills and letters of administration, and

all cognate matters usually incident to that branch of judicature. The constitution of the state as originally adopted in 1849, provided that the judicial power of the state should be vested in a supreme court, district courts, county courts and justices of the peace, and that the legislature might establish such municipal and other inferior courts as might be deemed necessary. Art. V., Sec. 1. It also ordained that there should be elected in each of the organized counties, one judge, who should hold his office for four years, and should hold the county court, and perform the duties of surrogate or probate judge. Art. VI., Sec. 8.

These provisions were somewhat modified in September, 1862, but not in any manner material to this case. Moreover the will in question was admitted to probate in October, 1860, before any modification took place. The act of the legislature in force at that time, on the subject of probate, was the act of May 1, 1851, entitled "An act to regulate the settlement of the estates of deceased persons." By this act as it stood in 1860, having been somewhat modified by sundry amendments, it was declared that the county courts, when sitting for the transaction of probate business, should be known and called the "probate court," and the county judge should be *ex officio* probate judge. The mode of procedure for probate of wills was pointed out. A petition was to be filed in the proper court by the executor or other person interested, and a day appointed for proving the will, not less than ten nor more than thirty days distant; and notice was to be published not less than twice a week in a newspaper published in the county, if there was one; if not, then by posting in three public places in the county. Hittell's Laws of Cal., Art. Probate Act, Chap. II., Sects. 4-13. Citations were also to be issued to the heirs, if they resided in the county, and to any executors named in the will and not joining in the application for probate. Subpœnas were to be issued to the witnesses if they resided in the county. Any person interested might appear and contest the will; and if it should appear that there were minors or non-residents of the county interested, the court was to appoint an attorney to represent them. If any person should appear and contest the will he must file a statement in writing of the grounds of his opposition. Issues when formed were to be sent to the district court for trial by jury, unless the parties consented to a trial in the probate court. Sects. 16-20. Incompetency, restraint, undue influence, fraudulent representations, and any other cause affecting the validity of the will, are specially mentioned as questions upon which issues might thus be formed. Various provisions were added calculated to secure a thorough investigation on the merits. Sec. 20.

It was further provided, that when a will had been admitted to probate, any person interested might at any time within one year after such probate, contest the same or the validity of the will, by filing in the same court a petition containing his allegations against its validity or the sufficiency of the proof, and praying that the probate might be revoked. Hereupon new citations were to be issued and a new trial had. But it was declared that if no person should within one year appear to contest the will or probate, the latter should be conclusive, saving to infants, married women, and persons of unsound mind, a like period of one year after disability removed. Sects. 30-36.

In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the end of justice and truth.

The question recurs, do the facts stated in the present bill lay a sufficient ground for equitable interference with the probate of David C. Broderick's will, or for establishing a trust as against the purchasers of his estate in favor of the complainants? It needs no argument to show, as it is perfectly apparent, that every objection to the will or probate thereof could have been raised, if it was not raised, in the probate court during the proceedings instituted for proving the will, or at any time within a year after probate was granted; and that the relief sought by declaring the purchasers trustees for the benefit of the complainants, would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire right of the parties; and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief.

But the complainants allege that in consequence of circumstances beyond their control, and without their fault, they had no knowledge or information of Broderick's death, and, of course, no knowledge of the forgery of his will until within three years prior to the commencement of this suit, and after the period for contesting the will in the probate court had expired, and when the power of said court to investigate the subject further had ceased. They therefore insist that as the probate court had no further jurisdiction over the subject, a court of equity was competent to give relief as against parties having possession of the estate or its proceeds *mala fide* or without consideration.

Concede this to be true to a certain extent where injured parties have not lost their opportunity of appearing in the court of probate, or in the equity court by any laches of their own; still it can not help the complainants. What excuse have they for not appearing in the probate court, for example? None. No allegation is made that the notices were fraudulently suppressed, or that the death of Broderick was fraudulently concealed. The only excuse attempted to be offered is, that they lived in a secluded region and did not hear of his death, or of the probate proceedings. If this excuse could prevail it would unsettle all proceedings *in rem*.

But even admitting that, as to surplus proceeds, and property undisposed of or acquired by those having actual knowledge of the fraud, the complainants might come into a court of equity on the ground of their own ignorance of the events when they transpired, they would still have to encounter the statute of limitations, which expressly declares that action for relief on the ground of fraud can only be commenced within three years; and the statutes of limitation in California apply to suits in equity as well as to actions at law. Boyd v. Blankman, 29 Cal. 19. It is true that it is added that the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. But that is only the application to cases at law of a principle which has always been acted upon in courts of equity. If fraud is kept concealed so as not to come to the knowledge of the party injured, those courts will not charge him with laches or negligence in the vindication of his rights until after he has discovered the facts constituting the fraud. And this is most just. But that principle can not avail the complainants in this case. By their own showing their delay was due, not to ignorance of the fraud, nor to any attempt to conceal it, but to ignorance of Broderick's death, and all the open and public facts of the case. They admit, and expressly charge, that it was a matter of public notoriety at San Francisco, as early as 1861, that the will in question was not Broderick's will, but was a forged and simulated paper. They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or the sale of his property, or any events connected with the settlement of his estate, until many years after these events had transpired. Parties can not thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judictal proceedings *in rem*.

The fact that two of the complainants are married women, does not take them out of the operation of the statute of limitations of California. They are only exempt when it is necessary that their

husbands should join them in the suit. This is not necessary by the law of the state where they sue for their separate estate, as in the present case. As to such property they act as *femmes sole*. This suit, had it lain at all, could have been brought by the complainants, who are married women, though their husbands had refused to join them therein.

The statute of 1862 has been referred to, which gives to the district courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment, or perjury. Whilst it is true that alterations in the jurisdiction of the state courts can not affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts, as well as by the courts of the state. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding. Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties. But the statute referred to can not affect this suit, inasmuch as the statute of limitations would still apply in full force, and would present a perfect bar to the suit.

We can perceive no ground on which the bill in this case can be sustained.

The decree is affirmed.

Mr. Justice SWAYNE especially concurring.

Mr. Justice CLIFFORD dissenting.

I dissent from the opinion and judgment of the court in this case, for the following reasons: (1) Because courts of equity may exercise jurisdiction to set aside and annul a decree of the probate court approving and allowing an instrument purporting to be the last will and testament of a deceased person, in a case where it appears that the instrument is a forgery and that the decree approving and allowing the instrument was procured by perjury and fraud, provided it appears that the injured part has not been guilty of laches, and that he has no other adequate remedy. (2) Because all the leading authorities cited to support the opposite rule admit that the jurisdiction does exist in cases where there is no other remedy. (3) Because the right of the complainants in this cause is not barred by the statute of limitations.

Mr. Justice DAVIS concurs in this dissent.

Effect of Deed to Alien Under the Laws of Mexico.

HAMMEKIN v. CLAYTON.

United States Circuit Court, Austin, Texas, January Term, 1874.

Before Hon. W. D. WOODS, Circuit Judge, and Hon. T. H. DUVAL, District Judge.

Deed to an Alien.—Under the laws of Mexico, in force in Texas, in 1836, a deed to an alien was not void, but voidable.

The following opinions of Judges Woods and Duval, were delivered in deciding a motion for a new trial, in the U. S. Circuit Court, for the Western District of Texas, made by the plaintiff. On the trial of the cause, Judge Duval alone sat and there held, for reasons stated in his present opinion, that the deed to the plaintiff was an absolute nullity. At the request of Judge Duval, in which the counsel on both sides joined, Judge Woods, who had taken his seat on the bench after the trial of the cause, sat with him during the argument on the motion for a new trial, when both of the following opinions were delivered:

WOODS, J.—The case was an action of trespass to try titles, and the facts were substantially as follows: The plaintiff claims title under an eleven-league grant, made by the state of Coahuila and Texas, to Emanuel Crescentia Rejon, dated Nov. 8, 1833. On the 11th day of April, 1836, by a deed of that date executed in the city of Mexico, Rejon conveyed the land in question to Mrs. Laguerenne. On the 27th of September, 1836, Mrs. Laguerenne executed, at the city of Mexico, an instrument in writing of that date, by which she declared that she held the said land in trust for the plaintiff, Geo. S. Hammekin, and convey the same to him. On the 28th of July, 1840, Mrs. Laguerenne united with her husband in a deed of that date, whereby she conveyed the land to the plaintiff, Hammekin.

The plaintiff was a native of the state of New York, and emigrated to the Republic of Mexico in 1831, and became domiciliated in the city of Mexico, where he remained until 1836. In April of that year, he purchased the land in question, and paid for it 3,000 silver dollars. The deed therefor was made to Mrs. Saguerenne, who was a native of Mexico, and had never resided out of the country. The deed was made to him in trust for the plaintiff, and the reason why it was not made directly to the plaintiff, was, that the law of the Republic of Mexico, as the party supposed, prohibited a foreigner from holding real estate situated in the Republic.

On the 2nd of March, 1836, the independence of the Republic of Texas was declared, and on the 17th of the same month, the constitution of the Texan Republic was adopted. These facts were, at the time of the execution of the deed to Mrs. Laguerenne, unknown to her and to Hammekin.

In April, 1836, after the conveyance to Mrs. Laguerenne, the plaintiff took from her a power of attorney to sell the land and started to Texas. He was shipwrecked and did not reach his destination until June, 1836, at which date he became a citizen of the Republic of Texas, and continued to reside in Texas, as a citizen until 1845. In 1838 he paid the land dues on the land. In 1845, he left Texas and again became a citizen of the United States, and has so continued until the commencement of this suit, being at the latter date a citizen of New York.

In 1838, Mr. and Mrs. Laguerenne removed to, and resided in New Orleans, and while there executed the deed to plaintiff, dated July 28, 1840. In 1840, or 1841, they returned to the city of Mexico, where Mr. Laguerenne died, and where Mrs. Laguerenne, who is still living resides. The defendant was in possession of the land in controversy at the commencement of the suit, but showed no title whatever.

The constitution of the Republic of Texas, sec. 10, General Provisions (Pas. Dig. vol. 1, p. 37) declares that "no alien shall hold land in Texas, except by title emanating directly from the government of this Republic."

Upon this state of facts the court instructed the jury, that the deed from Rejon to Mrs. Laguerenne, of April 11, 1836, was absolutely void and conveyed no title to the grantee. In pursuance of this instruction, the jury returned a verdict for defendant. The motion for new trial is based on the alleged error of the court in giving such instructions to the jury.

The defendant insists that the instruction was correct, and that the deed was void upon two grounds: (1.) Because it was made with the purpose to evade the laws of the state of which Mrs. Laguerenne was a citizen, and where the plaintiff was domiciliated; and (2.) Because at the date of the deed, the Republic of Texas, within which the land was situated, had declared its independence and adopted a constitution, and both the constitution and laws of Texas forbid that an alien should hold lands except by titles emanating directly from the government of the Republic.

We will notice these two points in their order:

It is claimed by the plaintiff, that the law of Mexico at the date of the deed in question, did not absolutely prohibit all foreigners from acquiring and holding real estate in Mexico, and to sustain this view he cites the 6th, 9th and 10th sections of the decree of March 12, 1828, found on page 349 of Schmidt's Civil Law of Spain and Mexico. In the view we take of the case it is unnecessary to decide this question. Conceding that the law of Mexico was as claimed by defendant, we think it does not follow that the deed to Mrs. Laguerenne was void. There is no evidence in the case that

a, the grantor, knew that the deed was in trust for Hammekin. We think that the deed operated to convey the title out of Rejon, and that the most that could be claimed was that the trust was raised. Hubbard v. Goodwin, 3 Leigh, 492; Taylor v. Benham, 5 Howard, 270; Phillips v. Cremard, 2 Wash. C. C. 447.

The main question in the case is the second, namely: was the deed in question, by the constitution and laws of the Republic of Texas, absolutely void, so as to convey no title to Hammekin?

Between the 17th of March, 1836, and the 20th of January, 1840, the laws of Mexico, unless when modified by the constitution and statutes of the Republic of Texas, were in force in Texas. Barrett v. Kelly, 31 Texas 481; Hanrick v. Barton, 16 Wallace, 166. It becomes important, therefore, to determine whether by the Mexican law, the deed of Rejon was void and conveyed no title. Upon this point the decided weight of authority is, in our opinion, with the negative of this proposition. The rule of the common law is well settled that an alien may hold real estate against every one, and even against the government, until office found. 3 Blackstone, 259; Craig v. Leslie, 3 Wheaton, 568. That this is the rule of the civil law of Mexico, is shown by the following authorities: Escreche Partidos Hispan. Mexicanos, vol. 2, 696; Sala Mexicana vol. 2, 240; Ramirez v. Kent, 2 Cal. 599; The People v. Folsom, 5 Cal. 378; Merle v. Matthews, 26 Cal. 478.

In the last cited case the court says: "At common law a conveyance of land to an alien was cause of forfeiture to the crown of such lands, not only on account of his presumption in attempting by an act of his own to acquire real property (2 Black. 274); but notwithstanding until office found, the title remained in him. So far as we are advised, the consequences that might follow this species of infraction of the law were substantially the same under the Mexican law as at common law, and until denouncement the alien grantee of land could hold and possess it as his own property."

So in Racouillat v. Sansevain, 32 Cal. 386, the court declares that "the question as to the right of a non-resident alien to hold property at common law, and as we understand it, under the civil law, was a matter between the alien and the government, and could not be called in question in a collateral proceeding between individuals. The proceeding at common law to divest an alien of property purchased, is by an inquest of office, and until office found, an alien may hold real estate. Under the civil law there was some analogous proceeding." In Osterman v. Baldwin, 6 Wall. 121, the facts run almost on all fours with the case at bar. In 1839, prior to the admission of Texas into the Union, Baldwin, a citizen of New York, and an alien to Texas, bought and paid for some lots in the city of Galveston. It was objected to Baldwin's title, that when his purchase was made, Texas was a foreign country, with a a constitution forbidding aliens to hold real estate. The supreme court held that "the defendants could not object on that ground, that until office found, Baldwin was competent to hold land against third persons; no one has any right to complain in a collateral proceeding, if the sovereign does not force his prerogative."

But it is insisted that the Supreme Court of Texas has settled the law otherwise, and that this court should follow the courts of Texas, which have established the contrary doctrine as a rule of property in the state. We are cited to the cases of Holliman v. Peebles, 1 Texas, 673; Yates v. Iams, 10 Texas, 168; Clay v. Clay, 26 Texas, 31; Odom v. Lacoste, 26 Texas, 458; and other cases, to show that the ruling of the supreme court of this state has been that a deed of lands to an alien, under the laws of the Republic of Mexico, was absolutely void and conveyed no title.

We should feel bound to follow these decisions of the Supreme Court of Texas, had they not been unsettled by later adjudications.

The case of Barrett v. Kelly, reported in 31 Texas, page 476, is subsequent in date to all the cases cited to show the invalidity of the deed of Rejon, and is entirely inconsistent with those cases, and though it does not in words, yet in effect it over-rules them. The facts in that case were, that Wharton, a citizen of Mexico, on the 13th of April, 1833, executed a conveyance for lands in Texas to J. & W. D. Barrett, who were aliens, and the point was distinctly made in the case that the alienage of the Barretts gave Kelly, who claimed under a junior grant, the better title. But the court sustains the Barrett title, and took the same view of the Mexican law as was taken by the Supreme Court of California, in the cases above cited. The learned judge who delivered the opinion says: "From 1833 to 1840, the defendants (the Barretts) were liable to have their land divested from them by due process of law, according to the laws of Mexico. There is no allegation that any court or political authority ever adjudicated upon the alienage of defendants while they were such, and there can be as little question that without some process of this kind, the rights of the parties to the land were never divested." These remarks of the court and its action in the case, are entirely inconsistent with the doctrine in Clay v. Clay (*supra*), that the deed to the Barretts was absolutely void, and conveyed no title.

In the case of Settegast v. Schrimpf, 33 Texas, 341, the supreme court of the state appear to cite with approbation the case of Osterman v. Baldwin, 6 Wallace (*supra*).

We are of opinion, therefore, that the later and better view of the supreme court of the state, is that under the Mexican law, a deed to an alien was not void, but conveyed an estate subject to be divested upon a proceeding by the government for that purpose.

Our conclusion is, therefore, that a new trial should be granted, on account of the error of the court in instructing the jury that the deed from Rejon to Mrs. Laguerenne, was void and conveyed no title.

DUVAL, J.—In instructing the jury, upon the trial of this case, that the deed from Rejon, to Mrs. Lageurenne was a nullity, and passed no title under the then existing laws of Mexico, I supposed that I was following what then seemed to me, to be the settled construction given to those laws by the supreme court of this state. At the same time I stated that this construction was not in accordance with my own views upon the subject.

Since the argument of this motion for a new trial, I have re-examined not only the authorities read on the trial, but others submitted since. After a more thorough consideration of the questions involved, my conclusion is that I was mistaken in supposing that the law had been definitely settled, as it then appeared to me to have been, by the Supreme Court of this state, in the cases of Holloman v. Peebles; Yates v. Iams; Clay v. Clay, and Lacoste v. Odom.

If these cases are not absolutely overruled (so far as the present question is concerned) by the latter cases of Barrett v. Kelly and Settegast v. Schrimpf, supported, as they seem to be, by the case of Osterman v. Baldwin, reported in 6th Wall., they at least leave the question undetermined and doubtful, and it can not be said to have been clearly settled by the Supreme Court of this state.

Such seeming to me to be the case, and this court not being bound to follow any doubtful rule of construction, my opinion is that a new trial should be granted, and in this, I concur with the circuit court judge.

George F. Moore and Charles F. West, for the plaintiff; *William M. Walton*, for the defendant.

A Birds-Eye View of the Court and Counsel in the Tilton-Beecher Case.

IV.

WILLIAM A. BEACH.

One of the senior counsel in behalf of the plaintiff, a gentleman whose reputation the state over, is equalled by few and surpassed by none, perhaps, for refinement and appropriateness of action, for eloquence and logical reasoning, and for those qualities which distinguish him as being in every sense a generous and noble advocate.

Possessing a grand felicity of language and power, "to show vir-

tue her own feature, scorn her own image, and the very age and body of the time his form and pressure"—he is a great favorite in court. Mr. Beach is not far from sixty years of age; has a clear, fair complexion, classical features, a pleasant blue eye, and is of medium height. His general appearance is impressive, and a person who, in a lecture-room or crowded hall, would be taken for a man of mark.

He came to New York city in 1870, having previously practiced his profession in Albany and Saratoga—where, in either place, he was retained in all the important causes. He has uniformly kept out of the political arena, but has always assiduously courted the "jealous mistress" of the law.

He defended General Cole at Albany, when he was tried for the murder of Senator Hiscock, in 1869. He was counsel for Robert C. Dow, canal commissioner, who was impeached in 1868.

He was Commodore Vanderbilt's adviser and counsel in the great suit brought against him by the Erie Railway Co., involving $5,000,000, and won the case.

In the second trial of Edward S. Stokes, for the murder of Fisk, he acted on behalf of the people, and he was counsel for the plaintiff in the celebrated Brinkley divorce suit, and in each of these cases displayed much legal acumen and astuteness. He achieved a great success in the Cole case, exhibiting in the examination of the witnesses and his plea to the jury, remarkable foresight and eloquence. In the impeachment trial of Judge George G. Barnard, at Saratoga Springs several years since, his pathos and touching summing up to the jury, was clear and powerful and wrought many who listened to him to tears. He is commonly called Ex-judge, but as far as we can learn, never has been nearer that office than respectfully declining the position when offered.

In the very recent and able arguments rendered by the respective counsel of the plaintiff and the defendant, upon the important legal question of the admissibility of Theodore Tilton as a witness in his own behalf, after Mr. Evarts and Mr. Pryor had apparently exhausted the law upon the subject, Mr. Beach presented an argument on that occasion in favor of his client's admissibility, which enchained the attention of the court and the assembled auditory, beyond measure. His plea was couched in classical allusion and logical reasoning from beginning to the end of his address.

In the course of the discussion he illustrated the points of the several arguments presented, and pictured in bold relief the alleged insidious wiles which the defendant was charged with, in the course of which he said:

> And how is this question to be adjudged, sir? By the law of England as it was, or by the law of England of to-day? By the legislation of our associated states, or by the legislation and the law and the policy of the state of New York? Certainly, sir, by the latter, and what need to gather those ancient authorities pronounced under a rule and a policy inapplicable to the present condition of our society, and asserting none of the rights which, by modern legislation, have been conferred mutually upon husband and wife. My friends have been digging among fossils of a past generation. They are gathering here the dead carcasses of exploded theories and adjudications, and confronting them in ghastly contrast with what professes to be the improvement of modern times. Sir, we are not to be governed by them. Your honor is to decide this case in consonance with the ideas of this day, as they are established by the legislature and the law of this state, guided, I admit, by those general considerations of propriety, and by those rules which govern the construction and applications of statutes and decisions. For examining those, sir, in answer to the illustration of my learned friend, and to aid somewhat the idea of the real unpractical issue which is presented by this objection, permit me to follow him in an illustration. I imagine, sir, a happy and honored and a cultured home. The wife a frail and feeble and delicate woman, eminently devotional and pious in all her impulses, and, as has been shown in this case, and will be shown hereafter, devoted to the husband of her early choice and the father of her children. She had a pastor, learned and eminent, gifted beyond his fellows, one who stood at the very head of his honored and sacred profession, one whose words were listened to with deference and with acceptance. Ah! sir, he had those qualities of mind and heart; he had that persuasive power of eloquence, that insidious and silver tongue which would lure an angel from its paradise. He was her accepted and chosen teacher and guide. She looked up to him with a veneration second only to that with which she regarded her God. Nay, if an incarnate Christ had come down with the glory of Calvary upon his brow and the love of sacrifice in his eyes, she could not have bowed to him with more obedience and idolatrous deference than this woman rendered to her pastor and her earthly God. From her childhood, sir, she was under his teaching and dominion. He was almost an inmate of her home. In the confidence of a husband and a friend, a pupil of this aged and venerable and gifted man, he was welcomed with confidence and affection. He exerted upon her, sir, all his arts, his specious wisdom, his prayerful devotion. All the efforts of his gifted nature were banded to the seduction of this happy and beloved wife and mother, and she fell. And do you wonder, sir? Is she to be blamed for the act? Is this a prosecution of her? Is the action thereafter brought by her wronged husband an action against her for her condemnation? Oh! no, sir. Consider how strong he was, and how weak she was. Consider how submissive she was to his teachings, and imagine with what a specious and insidious tongue he propounded to her the theory which he advanced, that fornication was but a natural expression of love! He taught her to believe in pious adultery. By slow, but by steady steps, he led her along upon frail paths to the precipice from which she fell. That seducer is brought into a court of justice to answer for his crime. Husband wronged, seducer guilty, stand before the immaculate justice of the law, and before which each has to answer for the deeds done in respect to this woman. And we are told, sir—should be told, sir, in such a case, according to the logic of my learned friend—that this aged and venerable and gifted seducer may take the stand and polish and apologize for his guilt, and present all the defences of his practiced and learned ingenuity, and that the husband must be still and silent, and that this is the law—the law which is not a respector of persons, a law which holds out steady and even justice to litigants before it, and with all the sophistry of his great powers, my learned friend subsidizes them to establish that doctrine of injustice and wrong. I say again, sir, before your honor will adopt any such conclusion, before you will approve any such doctrine, you must be driven to it by the force of an irresistible and legal logic. Thank God there is, in my belief, no such rule in the law of this state! There is no such injustice in the policy of our legislature.

After an analytical sifting and reviewal of the several authorities cited by the learned counsel of the defendant, wherein many of them were shown to be applicable to the present state of facts, and that they were citations in cases adjudicated before the law of 1867, on the question of witnesses, he read from the case of Marsh v. Potter, in which case Mr. Justice Jones presided, and reasoned at length upon the effect of the said law. He adverted also to the case of Wehrkampt v. Willett, 4 Abbott's Court of Appeals Rep. p. 548, which was a case in point; also the case of Southwick v. Southwick, 49 N. Y. Rep, in which the issue arose whether in an action brought by the wife against her husband, to recover an alleged balance of money, they were, under the law, witnesses against each other. Folger, J., who is eminent for his careful and patient industry in the formation of his opinions, therein observed that:

> The first question made in this case is, whether the defendant was properly admitted as a witness in his own behalf against the plaintiff, his wife. It is claimed that the provisions of the Act of 1867 (2 Laws of 1867, p. 22-24), do not enable the defendant to become a witness against his wife in an action in which they are the only antagonistic parties. I have reached the opposite conclusion. It must be conceded that the object of the enactment was to alter the common law rule, which forbade the husband or wife being a witness for or against the other.

Having dilated upon the citations tending to show that Mr. Tilton was a competent witness, and adverting to the significance of the trial, on the renown of the defendant, and the misfortune that ever such necessity should have arisen, he remarked:

> Must he sit silent, sir? Is there no redress? For the wronged husband and the violated home, does the law afford no vengeance? Why, sir, it is, I think, a shame, although I believe I differ with my learned colleague in that respect; but I think it a burning shame to the law of this state, and of every other state where that law is wanting, that the seducer may not be pursued as a criminal; that licentiousness of this character is not punished by the heaviest judgment of the law, as it was condemned and punished by that infallible law which knows no error. But no remedy is given, sir. What must Theodore Tilton do? Must he suffer the animadversions of society? Must he lose wife and home, and see the seducer triumphant, flourishing, glorying in

his impunity, the happiest man in all this assembly? [Applause] Does the law afford no redress? None adequate, sir; and the only resource left to my client, given him by the law, was this action, or to take that other remedy condemned by the law of the state, but sanctioned by the common law of humanity, which reaches the heart and the life of the seducer. And had he done that, sir, instead of standing before your honor in his appeal for vindication and justice, he would have been arraigned as a criminal, and in danger of his life

The silver clearness of his voice, the liveliness of his enunciation, always make the strongest impression upon the listener; and may we not apply the lines of Dryden, which were spoken of Halifax, to Mr. Beach:

> "Of piercing wit and pregnant thought,
> Endowed by nature and by learning taught,
> To move assemblies."

Thus far in the progress of the great scandal case, this counsel has taken a limited part in the matter of examination of witnesses, but has left that branch of the case to the astute William Fullerton, his associate.

It is now authoritatively understood that Mr. Beach is to sum up the case for the plaintiff (which may not be until sometime in the spring), while the polished orator, ex-Judge John K. Porter, will perform that duty in behalf of Mr. Beecher. Notwithstanding it seems to be the general impression in the profession that a large degree of legal astuteness and ability is possessed by the several counsel for the defendant, which impression may be erroneous; it is very clear and certain that the advocates for the plaintiff are all intensely in earnest, active, skillful, and display the necessary legal abilities to match their opponents, and thus far we believe have presented a case which leaves little doubt in the public mind as to the relative moral *status* of the prosecution and the accused.

NEW YORK, Feb. 8, 1875. BETA.

Abstracts of Recent Decisions of the Supreme Court of the United States.

[Prepared by HENRY A. CHANEY, ESQ., of Detroit, Mich.]

Joint-Inventors — Abandonment of Patent—Partnership Relations.—Ambler v. Whipple, opinion by Mr. Justice Miller. These parties were copartners for the perfection of the invention of gas from petroleum, Ambler to furnish the brains and Whipple the money. One of the articles of agreement between them was as follows: "That any and all letters-patent that may be obtained in this country and all other countries by virtue of said invention, or by reason of any improvement, or of any modification of the same by either party, shall be owned by and between the parties to this agreement in equal shares, to-wit: one undivided half to each, and all proceeds of sale or sales of any and every kind and character shall be shared by and between the parties share and share alike." It appears that a patent was issued to these two in July, 1869, but that experiments were continued a month longer before the true principle sought for was discovered. Whipple then excluded Ambler, during the latter's temporary absence, from the partnership, and took in one Dickerson, who, a few days later, applied for a patent differing in some particulars from the former, but plainly growing out of the experiments of Whipple and Ambler. From this patent Whipple and Dickerson speedily realized great sums. Ambler filed a bill for a discovery of sales and profits, an injunction against the use of his invention, and a decree for compensation and damages. The defence set up that Ambler had conveyed his interest to Whipple through a third party, had abandoned the enterprise, and was drunken, of bad repute and a convicted felon, and furthermore, denied the identity of the inventions patented. Cross-bills and supplemental bills were filed, but no dissolution of the partnership was asked by either party. The testimony was voluminous and contradictory. The conclusions reached by the supreme court were: 1. That if Ambler really sold his interest in the partnership, his case is at an end, but that it does not appear that he did, the instrument relied on to show it, though sufficient in form to release both parties from their obligations, being neither drawn nor signed by him. There is testimony that he received a copy of it without objection, and promised to sign it, but although it is argued that the paper was obtained from Whipple at Ambler's request, and was signed by Whipple, it is evident that it was really drawn at Whipple's dictation and in his interest. Even if Ambler received a copy to examine, he had a right to refuse to sign it, and until he signed he was not bound. 2. That though Ambler left Washington for a week or two, in the middle of August, this can not be called a voluntary abandonment of the enterprise. He found himself excluded from the workshops on his return. 3. Facts of bad character, drunkenness and dishonesty would not authorize a partner of his own motion to treat the partnership as ended and take to himself the benefit of joint labors and joint property,—especially if, as seems likely in this case, the facts of former conviction of felony were known before the partnership was entered into. 4. That under the article above quoted, and in view of the peicularly confidential relations imposed by their connection with an invention which both parties were trying to effect, Whipple is chargeable, as trustee for Ambler, with half the profits of the two patents. It is clear that whichever saw most clearly the value of the discovery of the true principle, as soon as Whipple recognized it, he resolved to be rid of Ambler, and it is apparent that in violation of his trust, and in fraud of Ambler's rights, Whipple deliberately entered upon a scheme by which Ambler was to be deprived of the benefits resulting from success in their joint experiments. Dickerson, being knowingly connected with the fraud, can not resist Ambler's right to an undivided half, not only of the patent to himself and Whipple, but of another issued to them while suit was pending.

Replevin—Seizure under Writ de Ritorno Habendo Releases Defendant's Bond.—Douglass v. Douglass, opinion by Mr. Justice Swayne. 1. Where a defendant in replevin has given bond to return the goods in case it should be so adjudged, the seizure of them at the plaintiff's instance, under a writ *de ritorno habendo*, releases him from the necessity of seeking the plaintiff and tendering the goods. 2. Where such a seizure is made by the marshal at the plaintiff's instance, and the plaintiff then refuses the marshal's tender of the goods, he can not complain that the defendant has broken his bond in not returning the goods. The marshal's possession is the plaintiff's, and the latter's refusal is of no legal consequence. The seizure and tender satisfy the judgment of return and the defendant's obligation. Carico v. Taylor, 3 Dana, 33. Remedy for injury to the property can not be obtained by suit on the bond.

Recoupment of Damages for Defective Execution of Contract—Exceptions.—Florida R. R. Co. v. Smith, opinion by Mr. Justice Field. Smith built a draw-bridge for the company, and sued for the full contract price, the company insisting upon a right of recoupment for damages arising out of defective construction and the delays and expenses incident thereto. Evidence was excluded as to whether the structure and arrangements of the bridge caused any injury or damage, hinderance or delay to the company in the running of its railroad,—whether any hinderance or delay was caused by the imperfect construction of the bridge to any vessel in the navigation of the river,—whether the structure or working of the bridge rendered it liable to be injured or destroyed by vessels navigating the river,—and what number of hands were required to work the draw-bridge, and what number would be necessary if it had been properly constructed. 1. These questions were pertinent and proper in themselves. The objection that they related to speculative damages does not apply to the first and last, in which the damages sustained would be the subject of actual estimation. The facts sought would at least have furnished elements to the jury for a just estimate of the damages to be recouped from the demand of the contractor. 2. The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and when that price is demanded, will allow him to deduct the difference between it and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. 3. To render an exception available in the supreme court, it must affirmatively appear that the ruling excepted to affected, or might have affected, the decision of the case. See N. W. Union Packet-Boat Co. v. Clough *et ux.*, October Term, 1874. 4. The right of recoupment exists in all cases where an action is brought upon a building contract which imposes mutual duties and obligations, and there has been a breach of its terms either in the manner or time of execution, on the part of the plaintiffs, for which a cross-action might be maintained by the defendants. 5. Where a contract calls for the construction of a draw-bridge upon which the cars of a railroad company can cross, it implies that the bridge should be serviceable for that purpose, and capable of being used with the like facility as similar bridges properly constructed. If the condition of the pier upon which it is to rest, prevents this result, the contractors should insist upon the necessary alteration, or make it themselves,—especially where the pier itself has been built under the supervision of an agent of the contractors who also supervised the building of the bridge, and has been adopted by him as sufficient. His knowledge in this regard is the knowledge of the contractors, and they cannot charge the railroad company with the condition of the pier. Jones v. McDermott, 2 Wall. 7.

Re-conveyance Upon Failure of Trust—Special Findings.—French v. Edwards, opinion by Mr. Justice Swayne. 1. Where property is conveyed upon certain trusts, which become barren, and the *cestui qui* trust

has the exclusive beneficial right to the property, a re conveyance to him by the trustees is presumed both in equity and at law, if three things concur to warrant the presumption, viz. That it is the trustee's duty to convey, that there is sufficient reason for the presumption, and that its object is the support of a just title. Lade v. Holford, Buller N. P. 110; England v. Slade, 4 T. R. 682; Hill on Trustees, by Bispham, 394. The case must be such that a court of equity if called upon, would decree a re-conveyance. The presumption never arises where the actual conveyance would involve a breach of duty by the trustee, or wrong to others. The rule is firmly established in the English law. Langley v. Sneed, 1 S. & St. 55; Hilary v. Waller, 12 Ves. 252; Goodson v. Ellison, 8 Russ, 588; Doe v. Seyburn, 7 T. R. 3; Augien v. Stanard, 3 M & R. 571; Carteret v. Carteret 3 P. Wms. 134), and in American jurisprudence, Doe v. Campbell, 10 J. R, 475; Jackson v. Moore, 13 J. R 573; Moore v. Jackson, 4 Wend, 62; Aiken v. Smith, 1 Sneed, 301; Wash. Real Property, 415 and note 2. Where a court has stated a conclusion only as a conclusion of law arising upon the facts found, the supreme court regard such a finding of fact in the light of a special verdict. "If a special verdict on a mixed question of fact and law, find facts from which the court can draw clear conclusions, it is no objection to the verdict that the jury themselves have not drawn such conclusions, and stated them as facts in the case." Markhouse v. Hay, 8 Price, 256. A presumption may then arise with the same effect upon the specific findings, as if it had been expressly set forth as one of the facts found.

Equity has no Jurisdiction Where Legal Remedies are Adequate.—Lewis v. Cocks, opinion by Mr. Justice Swayne. This is a bill in equity, relating to property in New Orleans, sold under a judgment obtained by default. It is substantially a bill asking a court of equity to pronounce the sale void, take possession of the property and give it to the complainant, on the ground that the judgment below was null for non-service of the original process upon him, so that, as defendant below, he had no day in court. It is an action of ejectment in the form of a bill in chancery—1. As there is a plain and adequate remedy at law, a court of equity will not interpose; this principle dates from the earliest records of English equity jurisprudence. Spence's Jur. 408, b.; 420, a. The provision on the subject in § 16 of the Judiciary Act of 1786 (1 Stat. 82) is merely declaratory, and did not change the pre-existing law. 2. The bill here seeks to enforce a purely legal title. An action of ejectment is an adequate remedy. The questions touching service of process can be better tried at law than in equity. Courts of equity universally dismiss bills grounded upon merely legal titles. In such cases the adverse party has a constitutional right to trial by jury. Hipp v Babin, 19 How. 278; Knox v. Smith, 4 How. 298. 3. To bar equitable relief, the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant. Where the remedy at law is not "as practical and efficient to the ends of justice and its prompt administration," the aid of equity may be invoked, but if "it is plain, adequate, and complete," it must be pursued. Boyce v. Grundy, 3 Pet. 215. 4. In this case, the objection to equity jurisdiction was not made by demurrer, plea or answer, nor suggested by counsel, but if it clearly exists, it is the duty of the court *sua sponte* to recognize it and give it effect. Parker v. Win. L. C. & W. Co., 2 Black, 592; Baker v. Biddle, Baldwin's Rep., 416. 5. The provisional court of New Orleans is, and has repeatedly been held, valid. The Grapeshot, 9 Wall. 192.

Navigation — Collisions — Negligence. — Thompson v. Donaldson opinion by Mr. Justice Davis. The "Great Republic," a swft side-wheel steamer of 2,200 tons, ascending the Mississippi, behind the Cleona, a stern wheeler of 118 tons, followed the latter as it turned to cross the river, and ran it down in mid stream on a calm August evening, while it was still light enough to distinguish small objects on both banks. The opinion reviews and comments at length upon the testitmony. The pilot of the Republic says he supposed the movement of the Cleona to cross was a sheer. But the Cleona had signalled, though somewhat tardily, to keep to the right. And as boats are not apt to sheer in deep water, such an impression on the pilot's part was not admissible, and if disaster followed it, the consequences would rest on the boat he was guiding. But even if sheering were possible, he should have exchanged signals in order to understand the movement, and as his boat was astern and gaining rapidly on the other, it was his duty to give the first signal. He did not even answer the Cleona's signals, which the law says he must do, to avoid mistakes. 2. Precaution against danger necessarily rests to a greater extent upon the boat in the rear, particularly in the case of a large and fast steamer, following a small and slow boat. Whitridge v. Dill. 23 How. 454. 3. Whenever in any case of collision, it appears that one of the vessels has neglected the usual and proper measures of precaution, the burden is on her to show that the collision was not owing to her neglect. Meyer v. Steamboat Newport, 14 Int. Rev. Record, 37; The Schooner Lion, Sprague's Decisions, 40.

Deed of Homestead — Adverse Possession — Burden of Proof in Suit to Cancel Deed.—Grosholz v. Newman, opinion by Waite, C. J. 1. Where a bill is filed for the cancelment of a deed, on the ground that it was made for the purpose of conveying a part of the homestead, and as such was void, because the wife did not join with the husband in its execution the burden of proving that the land deeded is part of the homestead rests with the complainant, who must show that it was actually used, or manifestly intended to be used as part of the home of the family 2. Unless a purchaser knows, or ought to know from the circumstances, that the land he buys is part of a homestead, he has a right (in Texas) to treat with and purchase from the husband, without the wife's concurrence. And the vendor's secret and undivulged intention to use the lands as a homestead, can not affect the purchaser. 3. Where, in support of a bill for the cancelment of a deed, it is alleged that for ten years after its execution the premises were occupied adversely to the grantee, the burden is upon the complainant to prove this allegation, and show that the holding continued for ten full years.

Some Recent Decisions in Bankruptcy.

LIEN FOR RENT UNDER STATE STATUTE.

Longstreth, Assignee, P. E., v. Pennock *et al.* (U. S. Supreme Court, Oct. T., 1874, Swayne, J.) This is a writ of error to the Circuit Court of the United States, for the Eastern District of Pennsylvania.

The agreed facts render a statement of the case unnecessary.

The assignee acquired his title to the movable property found on the demised premises, subject to all the rights of all other persons. Gibson v. Warden, 14 Wall. 244. The rent in question was for a period which terminated when the assignee took possession; and the entire period was within a year of that time. Before the commencement of the proceedings in bankruptcy, the defendants in error might have distrained; and it is agreed that the property upon the premises was more than sufficient to satisfy the demand. The statute of Pennsylvania, of June 16, 1836, sec. 83, Purdon's Dig., 1873, p. 879, provides that where property under such circumstances is seized and sold under execution, the rent due for a period not exceeding one year, shall be paid first out of the proceeds of the sale. This case is within the equity of that statute. Sedgwick's Stat. and Const. Law, 293. The question presented is one belonging to the local law of Pennsylvania. We think it was correctly decided by the circuit court.

The judgment is affirmed.

The full text of the above opinion is given, but, the "agreed facts" not being at hand, its full scope is not quite clear. It is not certain what time is meant by "when the assignee took possession." He may be said to be in possession from the date of the commencement of proceedings in bankruptcy, as his title to the estate of the bankrupt relates to that time; or he may be said to take possession at the time when, after the adjudication, he has been appointed, accepted the trust, and actually commenced to administer upon the estate. As considerable time usually intervenes between the commencement of proceedings and the appointment of an assignee, it is impossible, without the "agreed facts," to say what is the exact point determined; and whether it is in accordance with, or overrules the case of Bailey, Assignee, v. Loeb *et al.*, 2 CENT. L. J. 42.

PREFERENCE BY WARRANT OF ATTORNEY—MEASURE OF DAMAGES.

The First National Bank of Clarion, P. E., v. Jones, Assignee. (U. S. Supreme Ct., Oct. T., 1874, Clifford, J.) Burns, the bankrupt, owed the bank two notes of $5,000 each, not yet due, but the officers of the bank required, and Burns gave a new note, payable one day after date, for the sum of $10,000, with interest, coupled with a warrant of attorney to confess judgment against him for the amount as of any term, with costs of suit, etc. Nine days thereafter, judgment was entered against Burns, under the warrant of attorney for $10,300, and on the next day a *præcipe* was filed for a *fieri facias*, seizure at once made by the sheriff, and property was sold, from which was realized the amount of the judgment. During the same month Burns filed his petition to be adjudged a bankrupt, and Jones afterwards became his assignee, and instituted this suit at law, alleging a preference under § 35. Verdict below for the assignee.

The opinion of the court, after stating the facts at length, is as follows:

I. Three of the errors assigned are addressed to the charge of the court, which was substantially as follows:

1. That every one is presumed to intend that which is the necessary and unavoidable consequence of his acts, and that the evidence introduced that the debtor signed and delivered to the defendants the judgment-note payable one day after date, giving to them the right to enter the same of record, and to issue execution thereon without delay, for a debt which was not then due, affords a strong ground to presume that the debtor intended to give the creditor a preference, and that the creditor intended to obtain it, and that it is wholly immaterial whether the preference was voluntary or was given at the urgent solicitation of the creditor.

Persons of sound mind and discretion must in general be understood to in-

tend, in the ordinary transactions of life, that which is the necessary and unavoidable consequence of their acts, as they are supposed to know what the consequences of their acts will be in such transactions. Experience has shown the rule to be a sound one and one safe to be applied in criminal as well as civil cases. Exceptions to it undoubtedly may arise, as where the consequences likely to flow from the act are not matters of common knowledge, or where the act or the consequence flowing from it is attended by circumstances tending to rebut the ordinary probative force of the act or to exculpate the intent of the agent. Nor is it any valid objection to the charge that the rule as stated is not one of universal application, as the court is not able to perceive that it was too broadly stated for the case to which it was applied, and the court is the better satisfied with that conclusion, in view of the fact that the record shows that witnesses were examined upon the same subject and that their testimony tended to prove the same issue.

Equally unfounded, also, is the objection to the closing paragraph of the instruction in question, as it is obviously immaterial whether the debtor gave the preference with or without solicitation from the creditor, if the evidence showed that he gave it as alleged in the declaration; for, if he gave it, the fact that he was urged to do so by the creditor, would constitute no defence to the action.

2. That if the jury find that the quantity and value of the assets of the debtor had not materially diminished from the date when the judgment-note was given till the day when he filed his petition in bankruptcy, and the day when he was adjudged a bankrupt, they may find that he was insolvent when he gave the judgment-note.

Even taken separately, it would be impossible to hold that the circumstantial facts embodied in the instruction did not tend to prove the hypothesis assumed by the plaintiff, and it is well settled that the force and effect of evidence, whether direct or circumstantial, should be left to the jury; but much other evidence was given to prove the same issue, and it would be an unreasonable construction of the charge to suppose that the court, in submitting that proposition to the jury, intended to exclude from their consideration all the other evidence in the case which was applicable to the same issue, and it is clear that the instruction, when viewed in the light of the circumstances under which it was given, is entirely unobjectionable.

3 That the measure of damages is the value of the property seized and sold by virtue of the execution issued on the judgment obtained against the debtor.

Instead of that it is contended by the defendants that the amount realized by the defendants is conclusive as to the value of the property seized and sold; but the plaintiff was not a party to that proceeding, and the express provision of the bankrupt act is, that the assignee may, in such a case, recover the property, or the value of it, from the person so receiving it or so to be benefited by it. Sold as the property was, at a judicial sale, it can not be recovered in specie, and the only remedy of the assignee is for the value of it, and no doubt is entertained that the rule prescribed as the measure of damages by the circuit court is correct. Conrad v. Ins. Co., 6 Pet. 274; Comly v. Fisher, Taney's Decs. 121; Marshall v. Knox., 16 Wall. 559; Eby v. Schumacher, 29 Penn. St. 40; Sedgw. on D. (6th ed.) 634; Mayne on D. (2d ed.) 317.

4. That the circuit court erred in refusing to charge the jury that inasmuch as the thirty-fifth section of the bankrupt act does not specify the giving of a warrant to confess judgment as a prohibited act, that no recovery in this case can be had under that section, and that the verdict must be for the defendant.

Much discussion of the proposition embodied in that prayer can not be necessary, as it is repugnant to the words of that section and to the repeated decision of this court upon the same subject.

5. Complaint is also made that the court below erred in refusing to charge that the court would not take jurisdiction of such a case where the claim had passed *in rem judicatam*, and that the goods had been sold upon the execution issued upon the judgment, but it is too clear for argument that the proposition is inconsistent with the provisions of the bankrupt act and utterly opposed to the settled doctrines of this court, which is all that need be said upon the subject.

6. Evidence was given by the plaintiff to show the value of the goods siezed and sold, and the defendants excepted to the ruling of the court in admitting that evidence, upon the ground that the amount realized by the sale of the property was the true measure of damages, but the court here is of a different opinion for the reasons already given, which need not be repeated.

7. Burns, the debtor, was called and examined by the defendants as a witness, and they offered to prove by him that the entry of the judgment and the issuing of the execution were a surprise to, and wholly unexpected by him, and that from the time he was first apprised of it he opposed the proceeding and endeavored to have the judgment opened.

Under the ruling of the court the defendants were allowed to prove all acts which the witness did in opposition to the enforcement of the judgment, but the court rejected the first part of the offer of proof, to wit, that the entry of the judgment and the issuing of the execution were a surprise to the debtor, and the defendants excepted to the ruling and now assign that ruling for error.

Well-founded doubts may arise whether even what the debtor did in opposition to the enforcement of the judgment was material to the issue between the parties, as the whole matter, when the debtor gave the note and warrant to confess judgment, passed entirely beyond his control. By his own voluntary act he empowered the defendants to enforce the payment of the amount whenever they pleased, in spite of any opposition he could make. Opposition, under such circumstances, being wholly unauthorized and gratuitous and useless, it could not serve to unfold, explain, or qualify the antecedent act of giving the note and warrant to confess judgment, as he knew, when he executed and delivered the instrument to the defendants, that it gave them the irrevocable power to enter the judgment and create the lien on his property and to sue out the execution and to seize and sell the property to pay the debt; but the evidence of what the debtor did in that behalf was admitted, and the ruling of the court not having been made the subject of an exception by either party, it is not necessary to express any decided opinion as to its admissibility.

Suppose the acts of the debtor in that regard were admissible, still it is quite clear that it was wholly immaterial whether the course pursued by the defendants in entering the judgment and issuing the execution was expected or unexpected by the debtor, as he had given them full power to do everything which they did do, whether he consented at the moment or not, and in spite of every opposition which he could make. Surprised or not the debtor must have known that the defendants, as against him, were plainly in the exercise of their legal rights as derived from him under the note and warrant to confess judgment. When he gave the instrument conferring that power, he knew beyond peradventure that the defendants could enter the judgment for the amount of the note whenever they should see fit, and that the judgment when entered, would or might become a lien on his property, and that it would secure to the creditor a preference over all his other creditors, even in opposition to any remonstrance or entreaty he might make to the contrary.

Such circumstances unexplained whould certainly have some tendency to show that the debtor procured his property to be seized on the execution with a view to give a preference to the favored creditor, but it is not necessary further to define in this case the force and effect of such an instrument as evidence to support such a charge, as other evidence was introduced by the plaintiff to prove that issue, which is conclusively established by the verdict of the jury. Power to enter the judgment was expressly conferred by the warrant duly executed by the debtor, and the direct effect of the judgment was to give the defendants a lien or the means of effecting a lien upon the property of the debtor and to authorize the defendants to sue out the execution and cause the property subject to the lien to be siezed and sold to make the money to pay the judgment.

Viewed in the light of these suggestions, it is obvious that it was wholly immaterial whether the debtor was surprised or not at the consequences, as they had all flowed from his own voluntary act.

Several other questions were discussed at the argument, but inasmuch as they are not within the errors assigned in the record, it is unnecessary to give them any separate examination.

Decree affirmed.

It has been generally understood at the bar (and by the district and circuit courts, as their decisions show), that the case of Wilson v. The City Bank, 18 Wall. 473, determined that a lien obtained by a judgment-creditor, will not be displaced by subsequent proceedings in bankruptcy against the debtor, though obtained within four months from the filing of the petition, even though the judgment-creditor may know the insolvent condition of the debtor, and the debtor should defer commencing proceedings in bankruptcy until such judgment could be obtained, and the advantage secured to the judgment-creditor. The above opinion would have been much more satisfactory if it had explained exactly why, the claim having passed *in rem judicatam*, the principle announced in Wilson v. The City Bank did not apply. Yet Mr. Justice Clifford is content, when alluding to this very point, to say, "it is too clear for argument that the proposition is inconsistent with the provisions of the bankrupt act, and utterly opposed to the settled doctrines of this court, which is all that need be said upon the subject."

There is opportunity for much conjecture as to the distinction which, it is presumed, the supreme court found, but did not specify between two cases. One conjecture might be that the giving a warrant to confess judgment, is such collusion between the debtor and creditor as to distinguish this case from Wilson v. City Bank. "Yet," says Mr. Justice Strong, in Clark v. Iselin (decided only a few days since in the supreme court, to be hereafter noticed),

"it is true that in Wilson v. The City Bank, the judgment under review and the execution thereon were obtained in an ordinary suit at law, to which the debtor made no defence, but allowed the judgment to be taken by default. In this case the judgment was entered by the creditor, in virtue of what is called a confession previously made, equivalent to a warrant of attorney to confess a judgment. But it is impossible that can make any difference in its validity." E. T. A.

Notes and Queries.

We invite answers to the following queries:

I. MISSOURI HOMESTEAD LAW.

BOLIVAR, MO.

EDITORS CENTRAL LAW JOURNAL:—A. and B. enter into written contract in Indiana, in 1866, for payment of $250. A. sues B. there in 1868, on contract. In 1869, and before judgment, B. moves to this state. In May, 1870, he buys a homestead and continues to reside on it until the present time. A. obtains judgment in Indiana, in July, 1870, two months after acquiring homestead here. Suit is brought on transcript of judgment in this state, in August, 1873, and judgment recovered here in April, 1874. Execution issues and the property is levied upon and sold, B. claiming the property as a homestead. The questions are—1. Does sec. 7 of the homestead act of Mo., make the homestead liable to execution for debts contracted after the passage of the act, but previous to acquiring homestead?

2. If, as in this case, the cause of action did not exist in this state at the time of acquiring the homestead, does it take precedence of the exempiton allowed in sec. 7 of the homestead act? Or, in other words, is the homestead liable for the judgment rendered here? Yours respectfully,

A. A. UNDERWOOD.

II. ACTION ON COUPONS—APPEAL TO UNITED STATES SUPREME COURT.

ST. LOUIS, MO.

EDITORS CENTRAL LAW JOURNAL:—Where judgment is rendered in the United States Circuit Court, in an action brought on coupons attached to bonds issued by a municipal corporation to a railroad company, when the amount involved is less than two thousand dollars, can the case be appealed to the supreme court, and is such judgment *res adjudicata*, in an action between the same parties on the bonds themselves, or upon other coupons attached to the same bonds, maturing subsequently?

III. SUITS ON ADMINSISTRATOR'S BOND BEFORE SETTLEMENT.

ELKO, NEV.

EDITORS CENTRAL LAW JOURNAL:—The laws of this state require administration of an estate to be settled and distribution made within one year, and provide for forcing him to do so by citation, etc. Where this has not been done, and an administrator has failed for three years to comply with the law, can action be maintained by the heirs upon his bond? That is, can an administrator's bond be sued on before final settlement, and a decree of distribution? B.

IV. LIABILITY OF SCHOOL DIRECTORS.

RULO, NEBRASKA, March 11, 1875.

EDITORS CENTRAL LAW JOURNAL:—If the law says that none but qualified teachers shall be hired, and then specifies what those qualifications are, and the board hire a party not so qualified, and pay him the stipulated price, can the district recover the amount of the wages back from the directors? Please cite authorities. Yours. J. M. C.

Recent Reports.

Reports of Cases Decided by the English Courts, with notes and references to kindred cases and authorities. By NATHANIEL C. MOAK. Vol. 7. Albany, N. Y.: William Gould & Son. 1874.

The excellence of this series, and the expense of keeping up full sets of the original volumes of English Reports, renders it a most valuable acquisition to the libraries of American lawyers. The present volume contains selections of cases from the Law Reports, comprising the following: 4 Admiralty and Ecclesiastical, 8 Chancery Appeals, 8 and 9 Common Pleas, 2 Crown Cases Reserved, 16 and 17 Equity Cases, 8 and 9 Exchequer, 6 House of Lords, 3 Probate and Divorce, and 8 and 9 Queen's Bench, in all, thirteen volumes. While there are a few cases re-printed, which may be of doubtful application and infrequent use, under our system of jurisprudence, the majority will be found of great value. The following are noted, as some of those likely to be of general interest to the profession.

Will—"Children" Means Legitimate Children—Evidence of Intention.—Hill v. Crook, p. 1. The word "children" in a will, was held to mean, *prima facie*, legitimate children. There must be unequivocal evidence in a will of an intention to benefit illegitimate children, by such designation as will make the identity of the intended beneficiaries certain. The case was elaborately argued and considered, and numerous authorities were cited by the court and counsel.

Bank—Draft Against Designated Fund—Specific Appropriation—Estoppel—Equitable Assignment.—Citizens' Bank of Louisiana, Appellant, v. First National Bank of New Orleans, respondent, p. 56, 6 House of Lords, 352.

Arrangement existed between the First National Bank of N. O., and the bank of Liverpool by which the former kept an account at the latter bank, replenished from time to time by remittances, against which it drew in selling sterling exchange in its regular course of business. On April 24, 1867, the respondent sold to the Citizens' Bank of Louisiana, such exchange for £10,000, drawn at sixty days, sight. The manager of the First National Bank, in the course of the transaction, assured the representative of the Citizens' Bank, that the bills were drawn against a sum largely in excess thereof on deposit in the Liverpool bank to its credit. On the 13th of May, 1867, the First National Bank of N. O. suspended payment, and notice thereof was transmitted to the Liverpool bank. A receiver was subsequently appointed, who demanded of the Liverpool bank the balance in its hands, for distribution among the general creditors of the suspended bank. The bills named, with others drawn under like circumstances, being presented to the Liverpool bank, acceptance and payment were refused. Suits were brought by the holders of the bills against the Liverpool bank, the suspended bank and its receiver, to enforce payment out of the fund, on the ground that the assets or fund, to the credit of the suspended bank in the Liverpool bank, had been specifically appropriated before the suspension, to the payment of the bills.

The evidence of such appropriation consisted of the assurances made by the officers of the suspended bank, that the bills were drawn against the said fund, which was much larger than was required to meet the same. It was claimed that the transaction amounted to an equitable assignment of so much of the fund as was required to meet the bills. Nothing appeared on the face of the bills to establish such specific appropriation. *Held*, the Lord Chancellor (Lord Selborne) delivering the judgment of the court, that the facts as stated did not constitute an equitable assignment or specific appropriation, nor did the representations made by the officers of the suspended bank concerning the fund, amount to an estoppel upon the receiver representing the suspended bank, to prevent him from claiming the fund. Appeal dismissed.

A valuable note is appended by the editor, citing many American cases upon this much litigated question, too numerous to be here designated.

Marine Insurance—Insurable Interest of Consignee.—Ebsworth v. The Alliance Marine Insurance Company, p. 155. (8 Common Pleas, 596). 1. Plaintiffs, merchants of London, in the regular course of business were notified by their correspondent at Bombay, of a shipment of 250 bales of cotton, with request to insure, and notice of a draft at six months' sight for £3,000 against the same, with shipping documents attached. The cotton was duly insured for £5,000, under two open policies held by plaintiffs in the defendant company, "as well in their own names, as for and in the name or names of all and every person and persons to whom the same doth, may or shall appertain, in part or in all." The draft was cashed by the National Bank of India, and by it transmitted to its manager in London for collection, and accepted by the plaintiffs, "against delivery of shipping documents" for the cotton.

The plaintiffs also agreed to hold the amount insured at the disposal of the bank until payment of their acceptance. The vessel on which the cotton was shipped was lost at sea before the maturity of the draft, and the plaintiffs paid the same at maturity, and sued for the amount of the insurance, claiming that they had the whole legal interest; that they were bound as consignees to receive and account for the whole proceeds of the cotton, and therefore were equally entitled to receive, and bound to account for the sum assessed by them thereon. Citing Bell v. Brownfield, 15 East, 364; Bell v. Ansley, 16 Id 141; Hiscock v. Barrett, cited, 16 Id. 145; Wolf v. Horncastle, 1. B & P. 316; Page v. Fry, 2 Id. 240; Cohen v. Harman, 5 Taunt, 101; Lucena v. Craufurd, 3 B. & P. 75; 2 B. & P. (N. R), 269; Carruthers v. Sheddon, 6 Taunt. 14; Sparkes v. Marshall, 2 Bing. N. C. 761; Hunter v. Leathley, 10 B. & C. 858; Watson v. Swann, 11 C. B. (N. S.), 756; 31 L. J. (C. P.). 210; Waters v. Monarch Ins. Co., 5 E. & B. 870; 25 L. J. (Q. B.) 102; London & N. W. R. Co., v. Glyn, 1 E. & E. 652; 28 L. J. (Q. B.), 188, and many others.

Claimed in defence, that the plaintiffs had no insurable interest in the cotton, but a mere expectancy, resting on a contingency: that if they had such interest it was limited to the amount of the bill they had accepted, and they had no right to insure for any but themselves, or any interest except their own.

Citing Robertson v. Hamilton, 14 East, 522; *Ex Parte*, Warren, 19 Ves. 345; Wolf v. Horncastle, *supra*; Lucena v. Craufurd, *supra*; Powles v. Hargreaves, 3 M. D. & De G. 430, 23 L. J. (ch.), 1; Irving v. Richardson, 2 B. & Ad. 193; Stockdale v. Dunlop, 6 M. & W. 224; Sutherland v. Pratt, 11 Id. 296, 12 Id. 17; Smith v. Virtue, 9 C. B. (N. S.), 214, 30 L. J. (C. P.), 156; Waters v. Monarch Ins. Co., *supra*; L. & N. W. R. Co. v. Glyn, *supra*; Bank of Ireland v. Perry, L. R 7 Ex. 14; *Ex Parte* Smart, Id. 8 Ch. Ap. 220; The Freedom, Id. 3 P. C. 594, and others.

The court, after having had the case sometime under advisement, was equally divided in opinion except on a simple point. It was *held* by the whole court that plaintiffs were entitled to recover for the amount of their advance or acceptance.

As to the other points, Bovill, C. J., and Denman, J, *held* that the plaintiffs had an equitable interest in every part of the cotton consigned to them as security for their advances thereon, and being also the consignees they were entitled to insure the whole value in their own names, and recover the whole insurance, holding the surplus as trustees for the other parties beneficially interested. Keating and Brett, JJ., *held* that plaintiffs were not entitled to recover beyond their own beneficial interest.

Marine Insurance—Detention of Goods in Besieged Town—Abandonment—"Restraint of Princes."—Rodocanachi v. Elliott, p. 200 (L. R. 8 Common Pleas, 649). This was also a suit on a Marine policy for the loss of goods (silks) shipped through France during the late war, and being there detained, in consequence of the war, the assured gave notice of abandonment and sent for the amount of the insurance. *Held*, that the detention of the goods in Paris by the seige, was a "restraint of princes," against which the policy insured, and the plaintiffs were entitled to abandon and recover as for a total loss.

Will—Evidence—Declarations of Testator.—Keen v. Keen, p. 341 (3 Probate and Divorce, 105). In order to rebut the presumption of revocation arising from a will which has been in the testator's possession, but which could not be found after his death, evidence was produced of declarations by the testator showing an intention to adhere to the will. The court *held*, that evidence of declarations of an intention not to adhere to the will, produced by the opponents of the will, was admissible to contradict the evidence of adherence, whatever might be the form of words in which such intention was expressed, and therefore that a declaration by the testator that he had burnt his will was admissible, not as evidence of the fact of destruction, but as evidence of intention.

Bottomry Bonds—Master's Wages—Preference.—The Eugenie, p. 360 (4 Ad. and Ecc. 123). When the master of a vessel executed bottomry bonds on ship, freight and cargo, binding himself personally, to meet the expenses of necessary repairs, *held*, that the master was entitled to have his wages paid out of the proceeds of the sale of the vessel and cargo, decreed in a suit by the owners of the cargo as endorsees of the bonds, before any portion of the fund was appropriated to the payment of the bonds.

Guaranty—Death of Guarantor—Notice.—Harris v. Fawcett, p. 430 (8 Ch. App. 886). F. guaranteed to a bank payment of advances to be made to his son not to exceed a fixed sum. The guaranty was to determine upon six months' notice by F. of withdrawal. F. died without giving such notice. At the time of his death his son owed the bank an amount in excess of the amount guaranteed. He continued to deal with the bank, paying at various times, in the aggregate, amounts exceeding his debt due at the death of F. and afterwards died, owing an amount less than the limit of the original guaranty. *Held*, in a suit on the guaranty, that the bank was not entitled to claim the benefit thereof.

Gift—Acceptance—Substitution of Promissory Note Therefore—Parol Evidence of Agreement.—Hill v. Wilson, p. 449 (8 Ch. App. 888). W., the uncle of plaintiff's wife, offered to give plaintiff £500 and deduct it from his intended legacy to the wife, and sent plaintiff a check for the amount. Plaintiff wrote to W promising to re-pay the amount By plaintiff's evidence a subsequent conversation with W. was shown wherein it was agreed that plaintiff should pay W. bank interest on the amount during W.'s life, and a note was given by him to W. to that effect, on the understanding that payment of the principal was not to be enforced. W.'s executors sued on the note, and the plaintiff herein sought to enjoin such suit. *Held*, that the executors were entitled to recover, for that there had been no acceptance by plaintiff of the £500 as a gift. The evidence of plaintiff as to parol agreement, uncorroborated, could not be admitted to rebut the effect of the documentary evidence appearing in the case. Citing Eastwood v. Kenyon, 11 A. & E. 438; Cooper v. Cooper, 8 Ch. App. 813; *supra*, p. 391, and note, p. 406.

Will—Child in Ventre sa Mere.—Pearce v. Carrington, p. 507 (8 Ch. App. 969). A testator gave a fund to his wife for life, then to his daughter (a married woman), for life, and after her death to her children, who being sons should attain the age of twenty-one, or being daughters, should attain that age or marry, and if none, then to certain persons by name. By a codicil he directed that if his daughter should be living at the expiration of five years from the death of his wife, and should not then have any child or children, the fund should at once be divided between the ulterior takers, as if his daughter were dead without children. The daughter's first child was born five years and six months after the death of testator's widow. *Held*, that as the child was *in ventre sa mere* within five years after the death of the widow, the gift over had not taken effect.

Party Wall—Wall Extending Above Adjoining Buildings—Ancient Lights.—Weston v. Arnold, p. 572 (8 Ch. App. 1084. Plaintiff's house had a party wall extending to the height of one story between it and defendant's building. Above that height it had windows opening to the external air. Plaintiff pulled down his house proposing to re-build it with windows as before. Before doing so he gave notice to defendant, under the "Bristol Improvement Act," that the wall was out of repair, and produced a certificate of two surveyors, directing its re-building at the joint expense of plaintiff and defendant. The defendant afterwards proceeded to extend his building upwards, so as to exclude the light from plaintiff's said upper windows.

Held, that a wall may be a party wall to such height as it belongs in common to two buildings, and cease to be a party wall for the rest of its height. Plaintiff was not precluded from making windows in the upper part of such wall. Injunction granted to restrain defendant from obstructing such windows by the extension of his building upwards.

Will—Legacies to Same Person by Different Instruments.—Whyte v. Whyte, p. 672 (17 Eq. Ca. 50). A testator gave two legacies of like amount to the same person, by two codicils to his will, executed at the same time, in nearly the same words, the codicils containing no other legacies. He sent one of the instruments to his solicitor, and the other to the legatee. Three years later he withdrew the instrument from his solicitor and sent it to the legatee. His original will had previously been executed in duplicate, one copy having been deposited with the solicitor, and the other with the principal beneficiary. *Held*, that the legacies given by the two codicils were substitutional and not cumulative.

Railway Company—Rights of Way—Level Crossing—Covenants to Make and Keep up Crossings.—United Land Co. v. Great Eastern Railway Co., p. 738 (17 Eq. Ca. 158). Defendant taking land compulsorily for right of way, undertook to establish and maintain level crossings at designated points thereon. The land was then under statutory prohibition against being built upon, being low and marshy. The prohibition was afterwards removed, and the land became suitable for building purposes, changing the manner of use of such crossings. *Held*, that the covenant to maintain the crossings could not be restricted to the original condition of the land, but must follow its changed condition, and the crossings must be maintained in such manner as to be suitable to the requirements of the public under the new condition of the law.

The above, of course, comprise but few of the important cases contained in the volume. Want of space forbids a more extended selection. As a repository of valuable authorities not easily accessible in their original form, this republication is becoming almost a necessity to the lawyers of this country.

C. A. C.

Book Notice.

THE AMERICAN LAW TIMES, for 1874. H. O. Houghton & Co: Riverside Press, Cambridge, Mass.

Under the skillful editorship of Mr. Rowland Cox, this publication has justly advanced to the very first rank of legal periodicals. Most of our readers are doubtless familiar with its character. It is published in monthly parts of 64 large, royal octavo pages, and consists of two parts, paged separately. The *Times* portion, 16 pages monthly, gives an original and carefully prepared digest of the current American decisions, stating where the original cases may be found *in extenso*, when and where decided. *This is a valuable and attractive feature.* The *Reports* portion occupies 48 pages monthly; and having had frequent occasion to consult and examine this periodical, we cannot refrain from commending the care and judgment which distinguish the selection of the cases reported. Questions of mere practice or of local or temporary interest are excluded, and those only of general and permanent value are published. Mr. Cox's marked fitness for his post, is in nothing more certainly shown than in the selection of the cases for publication.

J. F. D.

Legal News and Notes.

—NORTH CAROLINA has a *parliamentum indoctum*. A member was expelled the other day for being an atheist.

—STEPS have been taken by prominent members of the Nashville, Tennessee bar, to organize a bar and library association.

—THE article in the Quarterly Review, on the Judicial Investigation of Truth, which has attracted so much attention, is said to have been written by Mr. George William Hemming, of the chancery bar.

—THE revised statutes of the United States are now ready for distribution. The price at which this work is furnished by the secretary of state, is $3 71 per copy, being ten per centum advance on paper, presswork and binding.

—THE Supreme Court of the United States, before their recent recess, had heard 116 cases and had decided 106 of them. On assembling next Monday, the Kentucky election cases, and the case of Mrs. Miner of St. Louis, who claims the right to be registered as a voter under the 14th amendment, will be decided.

—MR. J. W. HUDDLESTON, Q. C., M. P., has been appointed to the puisne judgeship of the Court of Common Pleas, Westminister, resigned, in consequence of serious illness, by Mr. Justice Honyman Mr. Huddleston had a large practice at circuit, but the appointment is thought to be mainly a political one.

—IN the case of Davis v. The Third Avenue Railroad Company, recently tried in the Superior Court of New York city, it appeared that the servants of the defendant had ejected from one of their cars the husband of the plaintiff, while intoxicated, and that he had fallen on the track and had been run over and killed by another car. Monell, J., directed the jury to return a verdict for the defendant. See N. Y. Herald, March 5, p. 8.

—CHIEF JUSTICE MCKEAN, of Utah, has rendered a decision in the application of Ann Eliza, one of the polygamous wives of Brigham Young, the Mormon prophet, for *ad interim* alimony, pending her suit for divorce. The discussion rests entirely on technical grounds; and although the learned judge plainly states, that if the marriage turns out to be polygamous, it will be no marriage at all, yet he can not anticipate the evidence on this point, and therefore he awards provisional alimony. We shall publish the opinion next week.

—THE New York Medico-Legal Society ate its third annual dinner at Delimonico's on the 9th instant, Clark Bell, Esq., in the chair. The Daily Register says of this society: "The annual reunions of the two professions are necessarily promotive of benefit to each, and to the public at large. Already the influence of the society is being felt, and must increase, until a more philosophic view shall become prevalent upon the question of insanity in its relation to crime, and the substitution of hospitals for prisons in the treatment of criminals"

—THE first decision under what is known as "the Poland Gag Law," has been rendered by Mr. District Judge Treat, of the federal court at Saint Louis. Buell, a resident of this city, and an attache of the Saint Louis Republican, was indicted under that law, by a grand jury of the Supreme Court of the District of Columbia, for publishing in a Detroit newspaper, of which he was the Washington correspondent, a libel upon Senator Chandler of Michigan. Judge Treat decides that the case does not come under the Poland law.

—THE Supreme Court of New York City, in General Term, before judges Westbrook, Daniels and Donohue, have recently rendered an important decision in the Tweed *habeas corpus* case affirming the decision of the court of Oyer and Terminer, which refused to enlarge Tweed from his imprisonment on Blackwell's Island. The court hold that his trial and conviction upon what is known as an "omnibus" indictment, were legal. Judges Westbrook and Daniels read written opinions, the substance of which is given in the N. Y. Herald of the 13th instant.

—A LAW has been passed by the Tennessee legislature to facilitate the dispatch of business accumulated in the supreme court of that state. It provides for the appointment of a commission of three persons who shall act as a special court in hearing causes pending in the Supreme Court at Jackson. Only such cases as the parties thereto shall agree to submit to the commission, shall come within its jurisdiction. It is in fact a court of arbitration; but is not intended to be permanent. The commission is to report to the supreme court, and its conclusions are to stand as the judgments of the court. The arbitrators are to have the same salaries as the judges of the supreme court; and they are to exercise all the ordinary powers of a regular court. The opinions of the commission are not, however, to be published in the reports of the decisions of the supreme court; and such opinions are declared to have no other effect than to determine the particular cause wherein rendered, and are not to be deemed of any authority as precedents.—[*Albany Law Journal.*

—A NOVEL question has been before one of the local courts of New York city. John T. Robinson, who resided on a street traversed by a street-railway, applied for an injunction restraining the street-railway company from obstructing the sidewalk in front of his residence by piling up the snow thereon by means of a snow-plow, employed to keep its track clear. Judge Robinson of the court of common pleas, to whom the petition was addressed, after hearing arguments, took the papers, and has refused to grant the injunction, on the ground that the company did no more than discharge a duty imposed on them by law, in keeping their track clear and their cars running for the accommodation of the public. His opinion will be found in the New York Herald, for March 5, page 8.

—ENGLAND has drawn a troublesome prize in the election to Parliament of Dr. Kenealy, the counsellor for the Tichborne claimant. He presented himself to the speaker to be sworn, having first shocked the proprieties by carrying his umbrella with him; as it is a rule of the house, dating from 1688, that new members must be accompanied by two old ones, and, as Dr. Kenealy had been purposely allowed to present himself alone, the members not reflecting that this would assist his claim to martyrdom, the speaker refused to recognize him, and ordered him to retire, whereupon Mr. Disraeli succeeded in getting a vote to sustain the rule. Dr. Kenealy has given notice that on the 16th he will move a resolution about the Tichborne case. His paper, The Englishman, has a long article descriptive of "who Dr. Kenealy is," which declares that his voice is comparable only to Chatham, and a "torrent of eloquence rolled from his lips as a mighty river diffusing life, and health, and joy;" that he is a great and good man, the idol of the people, who fall on their knees to kiss his hand, and that "as he tamed the three judges and kept them down like three cats that hardly dared to mew in his presence, so he will master those right honorable humbugs who delude the people and pass the wicked laws under which they groan." In this country we have had this nearly equalled in pretense, but never in the prodigiousness of words deliberately printed, and the only conclusion is that England has now at least one madman in Parliament.—[*The Financier.*

—THE question to which we recently referred, of the production of reports made by medical men to railway companies, in railway accident cases, again came before the court of Queen's Bench on Monday last, in the case of Farquhar v. Great Northern Railway Company. In refusing a motion to set aside an order made at Chambers by Mr. Justice Archibald, for the production of a report of this kind, the Lord Chief Justice is reported to have said, that if such reports were privileged from production, he "should advise the patient not to admit the company's surgeon to see him. Why should he be allowed to see the patient, if the patient is not to be allowed to see the report he makes? If there was no negligence on the part of the company or their servants, they can not want to see the man; and, if they have been guilty of negligence, then they have no right to intrude upon him, unless for the purpose of the discovery and disclosure of the truth, for the purpose of justice. This court has upheld such an order as the present one, and I think it was a sound decision. It is most desirable that a medical man, on behalf of the company, should have an opportunity of seeing the patient, in order to ascertain the nature and extent of the injury. But then, on the other hand, the party should have the corresponding advantage of knowing what report has been made to the company about him. The decision of this court was sound and wholesome, and I, for one, am prepared to adhere to it."—[*The Solicitor's Journal.*

—A FRENCH MAIL DECISION.—A very curious decision, says the Paris correspondent of the London Daily Telegraph, was lately rendered by the council of state, under these circumstances: A certain M. Talfer of Paris had an Italian merchant, named Cappazulo, heavily in his debt. He felt reason to believe that his money was not secure, and, hearing that a letter containing large acceptances lay at the *poste restante here*, addressed to M. Cappazulo, he obtained an attachment from the president of the tribunal civil of the Seine and served it on the director of the post. In further proceedings M. Talfer obtained a judgment from the tribunal of *premiere instance*, recognizing the validity of this attachment and the obligation of the post-office authorities to honor it. But the postmaster-general, as we should say, interpreted his duty otherwise. Alleging that the inviolability of correspondence is a first maxim of civilized law, and moreover that France and Italy have exchanged a postal treaty in which it is strictly laid down that letters demanded by a subject of either nation shall be forwarded to him—he caused M. Cappazulo's letter, with the bills intact, to be re-directed to that gentleman, at the address given. Thereupon M. Talfer complained to the finance minister, exacting damages for the conduct of the post-office authorities; upon rejection of his demand, he followed up the matter to the council of state, which, in a lengthy judgment, has decided against him. All the same, we may feel pity for M. Talfer, who naturally thought his claim good when two legal tribunals encouraged him. Against these he has, in justice, if not in law, a solid argument for the re-payment of his costs.